Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 88-77)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback rates issued June 9, 1982, to October 27, 1988, inclusive, pursuant to subparts A and B, Part 191, and its predecessor Part 22, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(a), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner who issued the rate, and the date on which it was issued.

(DRA-1-CO:R:C:E)
Dated: November 29, 1988.
File: 221034

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: Amerex Corp.
Articles: Halon fire extinguishers
Merchandise: Imported halon 1211
Factory: Trussville, AL
Statement signed: March 22, 1988
Basis of claim: Used in
Rate issued by RC of Customs: New Orleans, May 2, 1988

(B) Company: Bilchem, Ltd.
Articles: Dipyridamol raw; dipyridamol pure; and dipyridamol tosylate
Merchandise: Imported nitroorotic acid of potassium salt; piperidine
Factory: Ponce, PR
Statement signed: May 20, 1982
Basis of claim: Used in

Rate issued by RC of Customs: Miami, June 9, 1982
Revokes: T.D. 80–111–C

(C) Company: Boxal, Inc.
Articles: Aluminum cans
Merchandise: Imported aluminum discs (slugs)
Factory: Cranbury, NJ
Statement signed: February 24, 1988
Basis of claim: Used in
Rate issued by RC of Customs: New York, March 8, 1988

(D) Company: Carver Corp.
Articles: 240 volt switchable receivers, tuners, amplifiers, and compact disc players; finished 110 volt switchable receivers; finished receivers, amplifiers, and speakers
Merchandise: Imported 110 volt receivers, tuners, amplifiers, and compact disc players; amplifier kits and sub woofers
Factory: Lynnwood, WA
Statement signed: October 4, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs: Los Angeles, October 27, 1988

(E) Company: Century Hulbert, Inc.
Articles: Finished marine lubricating oils
Merchandise: Imported lubricating oil concentrates
Factory: Kansas City, KS
Statement signed: June 3, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs: New Orleans, July 30, 1986

(F) Company: Cord Laboratories, Inc.
Articles: Granulated alpha methyldopa
Merchandise: Imported alpha methyldopa USP
Factory: Broomfield, CO
Statement signed: February 17, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs: New York, March 15, 1988

(G) Company: Design Containers, Inc.
Articles: Bottoms for asphalt containers
Merchandise: Imported black plate steel in coils
Factory: Jacksonville, FL
Statement signed: July 24, 1986
Basis of claim: Used in, less valuable waste
Rate issued by RC of Customs: Miami, September 2, 1986

(H) Company: Drexel Chemical Co.
Articles: Flowable agricultural chemicals

Merchandise: Imported agricultural chemicals
Factories: Memphis, TN; Tunica, MS; Mobile, AL; Cordele, GA
Statement signed: December 15, 1986
Basis of claim: Used in
Rate issued by RC of Customs: New Orleans, January 6, 1987
Revokes: T.D.s 80–265–D, 81–37–F, 81–273–E, 81–23–F, –G, –H, –I, –J, 83–256–I, 84–156–J, 85–89–G, –H, and –I

(I) Company: Eastern Alloys, Inc.
Articles: Zinc alloy ZAMAK
Merchandise: Imported high purity zinc meeting ASTM–B6 standards except for aluminum content
Factory: Maybrook, NY
Statement signed: October 7, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs: New York, March 4,1988

(J) Company: EMS—American Grilon, Inc.
Articles: Polyamide 12 (nylon 12), co-polyamide (nylon 6/6.6/12), all Grilamid products and Griltex 1, 2, 3, 4 & 5
Merchandise: Imported Lauryllactam, AH-salt, Grilon A23 natural, Grilon A28 natural, Grilon F47/R47 natural, Grilon F50 natural, 6368, Grilamid L16 natural, Grilamid L20 natural, Grilamid L25 natural, APO–712T, Tafmer MC–201
Factory: Sumter, SC
Statement signed: August 15, 1986
Basis of claim: Used in
Rate issued by RC of Customs: Miami, September 17, 1986

(K) Company: Genoa Cherry Co., Inc.
Articles: Maraschino cherries
Merchandise: Imported brined cherries (cherries in SO_2)
Factory: West New York, NJ
Statement signed: July 13, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs: New York, July 27, 1988

(L) Company: HIMONT U.S.A., Inc.
Articles: Polypropylene resin (PRO FAX)
Merchandise: Imported supported titanium component—FT4S–GF2A
Factories: Lake Charles, LA; Bayport, TX
Statement signed: July 18, 1986
Basis of claim: Used in
Rate issued by RC of Customs: Boston (Baltimore Liquidation), August 21, 1986

(M) Company: Intecolor Corp.
Articles: Micro computer terminals

Merchandise: Imported monitors and terminals
Factory: Norcross, GA
Statement signed: November 26, 1985
Basis of claim: Appearing in
Rate issued by RC of Customs: Miami, December 23, 1985

(N) Company: Meditec of America
Articles: Assembled and completed laser systems
Merchandise: Imported laser components and incomplete lasers
Factory: Clearwater, FL
Statement signed: May 6, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs: Miami, June 20, 1986

(O) Company: NSG America, Inc.
Articles: Complete SLA assembly
Merchandise: Imported lens (SLA)
Factory: Somerset, NJ
Statement signed: December 28, 1987
Basis of claim: Used in
Rate issued by RC of Customs: New York, March 4, 1988

(P) Company: Rieter Corp.
Articles: Textile machines
Merchandise Imported subassemblies parts and variable parts for textile machines
Factory: Aiken, SC
Statement signed: June 24, 1985
Basis of claim: Used in
Rate issued by RC of Customs: Miami, July 22, 1985

(Q) Company: Roatan International Corp.
Articles: Plastic mechanical pencils
Merchandise: Imported clutch mechanisms, extruded tube fitted with a spring, metal tip eraser and plastic, containing two pencil leads
Factory: Brooklyn, NY
Statement signed: July 25, 1988
Basis of claim: Used in
Rate issued by RC of Customs: New York, September 9, 1988

(R) Company: Sartorius, Inc.
Articles: Hemofilters
Merchandise: Imported filter material TDU, foam packing, caps, meshes, 90 & 45 degrees, covers (folding packing), bags (plastic), glue, bottom & tops (plastic), gaskets, and labels
Factory: Yauco, PR
Statement signed: July 29, 1986

Basis of claim: Appearing in
Rate issued by RC of Customs: Miami, September 17, 1986

(S) Company: Shieldalloy Corp.
Articles: Manganese quick-sol briquettes, manganese briquettes, manganese aluminum, manganese aluminum briquettes; aluminum manganese, aluminum manganese briquettes; chromium quick-sol briquettes, chromium briquettes, chromium aluminum, chromium aluminum briquettes; aluminum chromium, aluminum chromium briquettes
Merchandise: Imported manganese metal, manganese metal powder, manganese powder; electrolytic manganese metal, electrolytic manganese metal powder, manganese, manganese powder, electrolytic manganese; chrome, chromium, chromium metal, chromium metal powder, chromium powder; electrolytic chromium, electrolytic chromium metal, electrolytic chromium metal powder; aluminothermic chromium, aluminothermic chromium metal, aluminothermic chromium metal powder; aluminothermic metal powder
Factory: Newfield, NJ
Statement signed: December 11, 1986
Basis of claim: Used in
Rate issued by RC of Customs: Boston (Baltimore Liquidation), January 12, 1987
Revokes: T.D. 83–76–U

(T) Company: Timex Corp.
Articles: Finished watches, watch cases and bracelet assemblies
Merchandise: Imported watch cases, watch fitups (movements including dial, hands and crown/stem assemblies), safety chains, bracelets
Factory: Little Rock, AR
Statement signed: April 8, 1986
Basis of claim: Appearing in
Rate issued by RC of Customs: New Orleans, May 30, 1986

(U) Company: Tobacco Supply Co.
Articles: Semi-processed tobacco leaves (loose leaves or bundles); snuff; pipe tobacco; roll-your-own cigarette tobacco
Merchandise: Imported dark-air cured tobacco leaves; dark fire cured tobacco leaves
Factory: Springfield, TN
Statement signed: September 26, 1988
Basis of claim: Appearing in
Rate issued by RC of Customs: New York, October 14, 1988

(V) Company: Value Finishing, Inc.
Articles: Backed carpet

Merchandise: Imported unbacked carpet
Factory: Dalton, GA
Statement signed: May 26, 1986
Basis of claim: Used in, less valuable waste
Rate issued by RC of Customs: Miami, June 23, 1986

(W) Company: Western Fher Laboratories, Inc.
Articles: Dipyridamol and its salts; dichlorodipiperidinohomopurin dry (dichlor)
Merchandise: Imported nitroorotic acid of potassium salt (Noska); piperidine
Factory: Ponce, PR
Statement signed: May 20, 1982
Basis of claim: Used in
Rate issued by RC of Customs: Miami, June 9, 1982
Revokes: T.D. 80-111-Z

(X) Company: Zanon U.S.A., Inc.
Articles: Completed watches with bands or straps
Merchandise: Imported watch heads
Factory: El Segundo, CA
Statement signed: October 26, 1987
Basis of claim: Appearing in
Rate issued by RC of Customs: Los Angeles, November 16, 1987

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1. Cadillac Gage Company operating under T.D. 80-23-F has changed its name to Cadillac Gage Textron, Inc.
2. The B. F. Goodrich Company operating under T.D. 83-260-C has changed its name to The Uniroyal Goodrich Tire Co.
3. National Distillers and Chemical Corp., Emery Industries Div., operating under T.D. 82-202-O has changed its name to Quantum Chemical Corporation, Quantum Emery Division.
4. The Parker Pen Company operating under T.D. 82-117-R has changed its name to Parker Pen USA Limited.
5. Schnacke-Grasso, Inc., operating under T.D. 80-265-N has changed its name to Grasso, Inc.
6. The Southeast Diesel Corporation operating under T.D. 80-204-X has changed its name to Perkins Power Corp.
7. Witco Chemical Corporation operating under T.D. 52962-M and T.D. 80-154-Z has changed its name to Witco Corp.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 29, 1988.

The following are abstracts of unpublished rulings recently issued by the U.S. Customs Service. The abstracts are set forth to provide interested parties with general information regarding the types of issues currently being addressed by the U.S. Customs Service. By their inclusion herein, the rulings abstracted shall not be considered "published in the Customs Bulletin," within the meaning of section 177.10 of the Customs Regulations (19 CFR 177.10), nor do such abstracts establish a uniform practice.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 88-31)

Abstracts of Unpublished Customs Service Decisions

COMMODITY CLASSIFICATION

C.S.D. 88-31(1)—*Commodity:* Appliques of mixed sequins, hand-beaded, sewn to nylon organza fabric. *Classification:* Item is classifiable as embroidery under heading 5810 following GRI 1. This applicable subheading is 5810.92.0020 HTSUSA, textile category 229. *Document:* Hqs. ruling letter 081879, dated September 22, 1988.

C.S.D. 88-31(2)—*Commodity:* Belts of textile fabric decorated with glass beads and bugles. *Classification:* The belts are classified under subheading 6217.10.0030, HTSUSA, textile category 659, assuming that the fabric is of man-made fiber. *Document:* Hqs. ruling letter 081663, dated September 26, 1988.

C.S.D. 88-31(3)—*Commodity:* Belts of textile materials decorated with various combinations and patterns of beads, bugles, and sequins. *Classification:* These belts and similar articles are classified under subheading 6217.10.0030, HTSUSA, textile category

659, assuming that the fabric is of man-made fiber. *Document:* Hqs. ruling letter 081461, dated August 11, 1988.

C.S.D. 88–31(4)—*Commodity:* Belts for use in weight lifting. *Classification:* The weight lifting belts are classifiable under the provision for body supporting garments, item 376.2898, TSUSA, textile category 859. Classification under the HTSUSA is in subheading 9506.91.00.30 as exercise articles and equipment, and parts and accessories thereof, other. *Document:* Hqs. ruling letter 081246, dated September 12, 1988.

C.S.D. 88–31(5)—*Commodity:* Boot with cascade bottom. The cascade bottom is similar in design to the honeycomb sole. *Classification:* The boot is classified under subheading 6402.91.50, HTSUSA, as other footwear with soles and uppers of rubber or plastics, other footwear, covering the ankle, other footwear designed to be worn over, or in lieu of other footwear as a protection against water oil, grease, chemicals, cold, or inclement weather. *Document:* Hqs. ruling letter 081977, dated September 22, 1988.

C.S.D. 88–31(6)—*Commodity:* Boots, ski boots manufactured in Czechoslovakia. *Classification:* The ski boots, if with a plastic coating over .15 mm thick, would be classified under subheading 6402.11.00, HTSUSA, as cross-country ski boots with outer soles and uppers of rubber or plastics. If the boots have a plastic coating of 0.15 m or less, they would be classified under subheading 6403.11.60, HTSUSA, as cross-country ski boots with outer soles of rubber, plastics, or leather and uppers of leather. *Document:* Hqs. ruling letter 081839, dated September 27, 1988.

C.S.D. 88–31(7)—*Commodity:* Bridal veils made of stiffened textile material covered with satin, decorated with lace, plastic pearls, bugles, and sequins. *Classification:* Item is classified under 372.0400, TSUSA, textile category 369, if in chief value of cotton; 372.0600, TSUSA, textile category 669, if in chief value of man-made fibers. Subheading 6214.30.0000, HTSUSA, textile category 659, provides for those veils in chief weight of artificial fibers. Subheading 6214.90.0010, HTSUSA, textile category 359, provides for those veils in chief weight of cotton. *Document:* Hqs. ruling letter 081412, dated August 8, 1988.

C.S.D. 88–31(8)—*Commodity:* Clock/calculator key chain and pen packaged together for retail sale. *Classification:* The calculator/key chain is classified under subheading 8470.10.0040, HTSUSA; the pen is classified under subheading 9608.10.0000, HTSUSA. *Document:* Hqs. ruling letter 081193, dated August 2, 1988.

C.S.D. 88–31(9)—*Commodity:* Comforter (baby comforter) made of 100 percent polyester fill, and a fabric shell of 65 percent polyester and 35 percent cotton. When folded, the article takes the shape of a bunny. *Classification:* The article is classifiable in the provision for other bedding, ornamented, other, item 363.2575,

TSUSA, textile category 666. Classification under the HTSUSA is in the provision for articles of bedding * * *, other, quilts, eiderdowns and comforters, of man-made fibers, subheading 9404.90.9020, textile category 666. *Document:* Hqs. ruling letter 082520, dated September 20, 1988.

C.S.D. 88-31(10)—*Commodity:* Coveralls (nonwoven, disposable) made of 100 percent polypropylene. *Classification:* The instant coveralls are classified under the provision for coveralls, overalls, jumpsuits and similar apparel, whether or not known as playsuits, in item 384.9310, TSUSA, textile category 659. Classification under the HTSUSA is in subheading 6210.10.4020, garments made up of fabrics of heading 5602 or 5603, other, other, textile category 659. *Document:* Hqs. ruling letter 080460, dated August 25, 1988.

C.S.D. 88-31(11)—*Commodity:* Dialysis fluid warmer (portable device). The electronic components, thermostat and heating elements are housed in a molded light weight case. The unit operates on 12 volt current and adapts for use with 110 volt wall outlets. *Classification:* The device is classified under the HTSUSA provision in subheading 8543.80.9080, which covers other electrical machines and apparatus. The applicable item number from the TSUS is 688.42. *Document:* Hqs. ruling letter 081132, dated August 5, 1988.

C.S.D. 88-31(12)—*Commodity:* Drilling Centers, vertical spindle machine tools which drill, mill, and tap, equipped with computer numerical control and an automatic tool changer. *Classification:* The drilling centers are classifiable in item 674.3328, TSUSA. The HTSUSA subheading applicable is 8459.21.0080. *Document:* Hqs. ruling letter 082291, dated July 25, 1988.

C.S.D. 88-31(13)—*Commodity:* Fans (automotive radiator cooling fans), unfinished articles, parts chiefly used with automotive radiator cooling fans. *Classification:* Item is classifiable under 661.0640, TSUS. The HTSUSA subheading applicable to the instant article is 8414.90.1000, parts of fans (including blowers) and ventilating or recylcing hoods. *Document:* Hqs. ruling letter 081376, dated September 26, 1988.

C.S.D. 88-31(14)—*Commodity:* Girdles of man-made fibers, extended from waist to knees, velcro and/or zipper closures. Support belt, wrap-around style of man-made fibers with velcro closures. *Classification:* Girdles are classified in item 376.2470, TSUS and in subheading 6212.20.0020, HTSUSA. The support belt is classified in item 376.2470, TSUSA, and in subheading 6212.90.0030, HTSUSA. *Document:* Hqs. ruling letter 081270, dated September 1, 1988.

C.S.D. 88-31(15)—*Commodity:* Headrest, baby head support component made of textile materials. *Classification:* The article is clas-

sified in item 386.1443, TSUSA, as other ornamented articles of textile materials and under subheading 6307.90.9000, HTSUSA, as other made up articles. *Document:* Hqs. ruling letter 081832, dated October 3, 1988.

The Following are Abstracts of Unpublished Decisions of the New York Seaport Area:

C.S.D. 88–31(16)—*Commodity:* Cat collars made of leather and nylon with a buckle attached by elastic for safety. *Classification:* The cat collars are classifiable under HTSUSA subheading 4201.00.6000, as saddlery and harness for any animal * * *, of any material: other. *Document:* New York ruling letter 832349, dated October 28, 1988.

C.S.D. 88–31(17)—*Commodity:* Dress for a toddler, made of woven polyester and cotton. *Classification:* The toddler's dress is classifiable in HTSUSA subheading 6204.42.3060, which provides for women's or girl's suits, ensembles, suit-type jackets, blazers, dresses, shirts, divided skirts and trousers, bib and brace overalls, breeches and shorts (other than swimwear), dresses, of cotton, other * * *, girls. Textile category 336. *Document:* New York ruling letter 832835, dated October 28, 1988.

C.S.D. 88–31(18)—*Commodity:* Fabric braid made of 100 percent acrylic in various colors. *Classification:* The acrylic braid is classifiable in HTSUSA subheading 5808.10.3010, which provides for braids in the piece * * *, other * * *, of man-made fibers. *Document:* New York ruling letter 832746, dated October 28, 1988.

C.S.D. 88–31(19)—*Commodity:* Jacket, woman's finely knit reversible jacket, hip length, made of polyester and cotton. *Classification:* The jacket is classifiable in HTSUSA subheading 6102.30.2010, for women's or girl's overcoats and similar articles, knitted or crocheted, other than those of heading 6104: of man-made fibers: other, women's. Textile category 635. *Document:* New York ruling letter 831743, dated October 28, 1988.

C.S.D. 88–31(20)—*Commodity:* Jacket, woman's, polyester and cotton finely knit fabric, loose fitting, extends from the neck to 2 inches below the mid thigh area. *Classification:* The jacket is classifiable in HTSUSA subheading 6102.30.2010, for women's or girl's overcoats and similar articles, knitted or crocheted, other than those of heading 6104, of man-made fibers, other women's. Textile category 635. *Document:* New York ruling letter 832341, dated October 28, 1988.

C.S.D. 88–31(21)—*Commodity:* Jacket, woman's, of cotton, acrylic, wool, and spandex knit, four button closures, long sleeves, hemmed cuffs, straight hemmed bottom, two front patch pockets at the waist, shoulder pads. *Classification:* The garment is classifiable in HTSUSA subheading 6104.32.0000, for women's suit-

type jackets, knitted or crocheted, of cotton. Textile category 335. *Document:* New York ruling letter 832395, dated October 28, 1988.

C.S.D. 88–31(22)—*Commodity:* Shirt, woman's 100 percent cotton knit fabric, 3 inch wide rib knit band at bottom, one front pocket located at the waist, seven button closures, long sleeves, hemmed cuffs, rib knit pointed collar. *Classification:* The garment is classifiable under HTSUSA subheading 6110.20.2075, for women's or girl's sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted, other. Textile category 339. *Document:* New York ruling letter 832610, dated October 28, 1988.

C.S.D. 88–31(23)—*Commodity:* Stamp pads and stamps packaged together for retail sale. The stamp pad is a sheet of dry foam material in a small plastic box. The stamps depict houses, people, animals or trees. *Classification:* The stamp pads and stamps are classifiable in HTSUSA subheading 9503.90.6000, for other toys (except models), not having a spring mechanism. *Document:* New York ruling letter 832522, dated October 26, 1988.

C.S.D. 88–31(24)—*Commodity:* Stapler, desk type, 5.25 inches long, incorporates a base for placing it on a desk or table, rubber feet to prevent skidding/marring. *Classification:* The article is classifiable in HTSUSA subheading 8472.90.8080, for other office machines. *Document:* New York ruling letter 833050, dated November 1, 1988.

C.S.D. 88–31(25)—*Commodity:* Stapler and staples, mini stapler, packaged with a box of staples. The stapler is 3 inches long and incorporates a base for placing it on a table or desk. *Classification:* The stapler and staples are classifiable in HTSUSA subheading 8472.90.8080, for other office machines, other. *Document:* New York ruling letter 833049, dated November 1, 1988.

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 18, 1988.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 88–32)

Carriers: Definition of the term "Licensed yacht or undocumented American pleasure vessel." Ruling 108354, dated August 29, 1986 is modified.

Date: September 26, 1988
File: VES-4-01/VES-5-07 CO:R:P:C
109537 PH
Category: Carriers

MR. THOMAS MATTINA
DISTRICT DIRECTOR OF CUSTOMS
77 Southeast 5th Street
Miami, Florida 33131

Re: Definition of the term "Licensed Yacht or Undocumented American Pleasure Vessel" for Purposes of 19 U.S.C. 1441(3) and 46 U.S.C. App. 91

DEAR MR. MATTINA:

This is with reference to your memorandum of May 11, 1988 (Your Reference: VES-5-DD:I:S AKL), concerning the status of a state-numbered vessel owned and operated by a foreign citizen who is a resident of the United States.

Issue:

What is a "licensed yacht or undocumented American pleasure vessel," within the meaning of the provisions in 19 U.S.C. 1441(3) and 46 U.S.C. App. 91 exempting such vessels from entry and clearance under certain circumstances?

Law and Analysis:

Section 441(3), Tariff Act of 1930, as amended (19 U.S.C. 1441(3)), provides, in pertinent part, that:

> The following vessels shall not be required to make entry at the customhouse:
>
> (3) * * * licensed yachts or undocumented American pleasure vessels not engaged in trade: *Provided,* That such vessels do not in any way violate the customs or navigation laws of the Unit-

> ed States and have not visited any hovering vessel: *Provided further,* That the master of any such vessel which has on board any article required by law to be entered shall be required to report such article to the appropriate customs officer within twenty-four hours after arrival.

The statute requiring vessel clearance of a vessel bound to a foreign port or place (46 U.S.C. App. 91) contains a similar provision under which "a licensed yacht or an undocumented American pleasure vessel not engaged in any trade nor in any way violating the customs or navigation laws of the United States" is exempt from clearance.

In interpreting the meaning of the term "undocumented American pleasure vessel," we have held that:

> To be considered an undocumented American pleasure vessel (see 19 U.S.C. 1441(3)), a vessel must be wholly owned by a citizen and resident of the United States * * *. [A]n undocumented pleasure vessel is not considered "American" by the Customs Service merely because it receives a state number * * *. [Ruling letter dated April 22, 1982, File: 105332.]

More recently, we stated, in this regard, that:

> For purposes of the navigation laws administered by the Customs Service, a pleasure boat not documented by a foreign nation which has been issued a state number is considered to be an undocumented American pleasure vessel, regardless of its ownership. [Ruling letter dated August 29, 1986, File: 108354.]

You ask that we clarify these interpretations of the term "undocumented American pleasure vessel" with regard to an undocumented pleasure vessel numbered under a state numbering system and owned by someone other than a United States citizen.

Initially, we note that a pleasure vessel documented by the United States Coast Guard under 46 U.S.C. Chapter 121 would be considered a "licensed yacht" under 19 U.S.C. 1441(3) and 46 U.S.C. App. 91 (see 46 U.S.C. 12109, providing for the issuance of recreational vessel licenses, and 46 U.S.C. 2101(10), defining "documented vessel" as a vessel for which a certificate of documentation has been issued under Chapter 121 of Title 46). A pleasure vessel documented under a foreign flag would not be considered a licensed yacht or undocumented American pleasure vessel under sections 1441(3) and 91 regardless of whether it was licensed under a state numbering system (see 46 U.S.C. 2101(12), defining "foreign vessel" as a vessel of foreign registry or operated under the authority of a country except the United States; see also, Whiteman, *Digest of International Law,* vol. 9, pp. 25–27). An undocumented pleasure vessel owned by a citizen and resident of the United States would, of course, be considered an undocumented American pleasure vessel under sections 1441(3) and 91 (see Whiteman, *supra.*, Vol. 9, p. 37).

With regard to an undocumented pleasure vessel owned by a citizen who is not a resident of the United States, we note that we stat-

ed in the April 22, 1982, letter ruling quoted above that "[t]o be considered an undocumented American pleasure vessel * * *, a vessel must be wholly owned by a citizen *and resident* of the United States. (Emphasis added.) (See also, ruling letter to the District Director of Customs in Seattle, Washington, dated March 26, 1968, and letter dated April 29, 1982, File: 105288.)

We have thoroughly considered this issue. It is not apparent to us from the legislative history of the amendment (section 501, Customs Simplification Act of 1954; 68 Stat. 1140) which added the provision regarding undocumented American pleasure vessels to sections 1441(3) and 91 that such vessels must be owned by a United States citizen *and* resident (see Senate Report No. 2326, August 6, 1954, printed at 1954 U.S.C.C.A.N. 3900; see also, the memorandum providing the views of the Department of the Treasury on a similar provision transmitted to the Chairman of the House Committee on Ways and Means with a letter dated April 23, 1954, from the Acting Secretary of the Treasury). Nor do our early issuances concerning this provision contain such an interpretation (see, e.g., letter to Senator George Smathers dated February 18, 1955, and Marine Circular No. 143, dated May 19, 1955).

We believe that the most rational resolution of this issue is to be found in the United States vessel documentation requirements. An undocumented American pleasure vessel should be the same as a documented American pleasure vessel except that it is not documented. To be eligible for documentation, a vessel must be: (1) of at least 5 net tons; (2) not registered under the laws of a foreign country; and (3) owned by a citizen of the United States (see 46 U.S.C. 12102; 46 CFR Subpart 67.03; see also, 19 CFR 4.80(a)(2) and (3) in which allowance is made for vessels which may not be documented because of their tonnage). There is no residency requirement for United States vessel documentation. On this basis, we conclude that an undocumented pleasure vessel which is owned by a United States citizen would be considered an undocumented American pleasure vessel for purposes of sections 1441(3) and 91, regardless of whether or not that United States citizen is a United States resident.

Consistent with this conclusion, we believe that an undocumented pleasure vessel which is numbered under a State numbering system may not be considered an undocumented American pleasure vessel unless it qualifies, except for tonnage, for documentation under 46 U.S.C. 12102 (i.e., it must be United States owned and may not be registered under the laws of a foreign country). Thus, the August 29, 1986, ruling letter (File: 108354), is modified. This position is consistent with footnote 9 to section 4.3, Customs Regulations, and other authorities on this subject (see *The Chiquita,* 19 F.2d 417 (1927); Moore, *International Law,* vol. 2, pp. 1002–1009, cited in *The Chiquita;* and 80 *Corpus Juris Secundum* 569, citing *The Chiquita;* but see, *contra,* 46 U.S.C. 2101(46) defining "vessel of the United

States" to include numbered vessels *for purposes of 46 U.S.C. Subtitle II*).

With regard to the above determination, we note that under the Coast Guard Regulations on state numbering, a state numbering system may require the numbering of any vessel subject to the jurisdiction of the state, with certain exceptions not applicable in this case (see 33 CFR 174.11(b)). Thus, the fact that an undocumented pleasure vessel may be numbered under a state numbering system is not conclusive evidence that the vessel qualifies, except for tonnage, for documentation under 46 U.S.C. 12102.

Holdings:

1. A "licensed yacht or undocumented American pleasure vessel," within the meaning of the provisions in 19 U.S.C 1441(3) and 46 U.S.C. App. 91 exempting such vessels from entry and clearance under certain circumstances, includes:

(a) A pleasure vessel documented by the United States Coast Guard under 46 U.S.C. Chapter 121; and

(b) An undocumented pleasure vessel owned by a citizen of the United States, regardless of whether the United States citizen is a resident of the United States and regardless of whether the vessel is numbered under a state numbering system.

2. A "licensed yacht or undocumented American pleasure vessel," within the meaning of the provisions in 19 U.S.C. 1441(3) and 46 U.S.C. App. 91 exempting such vessels from entry and clearance under certain circumstances, does not include:

(a) A pleasure vessel documented under a foreign flag, regardless of whether it is owned by a citizen of the United States and regardless of whether it is numbered under a state numbering system; and

(b) An undocumented pleasure vessel owned by a foreign citizen, regardless of whether it is numbered under a state numbering system.

Effect on Other Rulings:

Ruling letter dated August 29, 1986 (File: 108354), is modified.

(C.S.D. 88-33)

Valuation: The dutiability of certain costs incurred in connection with the assembly abroad of U.S. components entitled to 807.00 TSUS treatment.

Date: September 19, 1988
File: CLA-2 CO:R:C:V
543873 CW

TO : Deputy Assistant Regional Commissioner (Regulatory Audit), Southeast Region

FROM : Director, Commercial Rulings Division

SUBJECT: Request for Reconsideration of Ruling dated March 3, 1986 (HQ 543576)

This is in reference to our memorandum to your office dated March 3, 1986 (HQ 543576), which responded to your request for advice concerning the dutiability of certain costs incurred in connection with the assembly abroad of U.S. components entitled to the exemption from duty provided for in item 807.00, Tariff Schedules of the United States (TSUS). As you know, by letter of January 10, 1987, S. Richard Shostak, Esq., representing the Bali Company ("importer"), requested a reconsideration of a portion of our March 3, 1986, ruling.

The reconsideration request relates to the second factual situation (case #2) discussed in our March 3, 1986, ruling, which concerned the dutiability of the salaries paid to three managers working at the assemblers' plants in the Dominican Republic. The ruling states in regard to this issue that the foreign assemblers do not maintain their own accounting systems, expense accounts, or general ledgers. These functions are handled by the assemblers' related importer who maintains separate expense accounts for itself and for each assembler. The importer transfers funds to the assemblers to reimburse the latter for expenses incurred in the assembly operations. The three managers receive a portion of their salaries through the assemblers' bank accounts and the remainder through the importer's bank account, although *all* of these labor costs are recorded by the importer in the assemblers' expense accounts.

We stated in the March 3, 1986, ruling that where a foreign producer's accounting records are maintained by a related company in the U.S., those records should be the basis for calculating the "cost or value of materials and fabrication" and the "amount for profit and general expenses" under computed value. However, this statement was subject to the condition that the producer's accounts are maintained in a separate cost center from the U.S. company's accounts and are consistent with generally accepted accounting principles applicable in the country of production.

Therefore, we concluded that where a foreign assembler's accounting records, as maintained by a related U.S. importer, are used as the basis for calculating computed value, then all labor costs reflected in those records are includable in the "cost or value of materials and fabrication" or the "amount for profit and general expenses." We stated that this is true notwithstanding the fact that

a portion of those salary costs was not paid by the assembler but was paid through the related importer's U.S. bank account. Similarly, we concluded that where the imported assembled merchandise is appraised under transaction value and that value is based on the reimbursement by the importer to the related assembler of actual costs recorded in the assembler's accounting records, then all general expenses reflected in the records maintained by the importer for the producer are properly included in transaction value.

In his request for reconsideration, counsel for the importer states that certain of the facts upon which our conclusions regarding case #2 were based are erroneous. Counsel asserts initially that the two foreign assemblers which were the subject of case #2 maintain their own financial records in the Dominican Republic and, although the importer maintains a "mirror U.S. dollar ledger" reflecting expenses incurred by the assemblers, it is incorrect to state that the importer maintains the assemblers' accounting records. Moreover, counsel states that only the portion of the managers' salaries paid through the assemblers' bank accounts is recorded in the assemblers' financial records maintained in the Dominican Republic. According to counsel, the portion of the salaries paid through the importer's bank account is recorded only in the importer's own books of account. Therefore, counsel contends that the portion of the salaries paid by the importer are non-dutiable pursuant to the holding in TAA #46, dated February 22, 1982 (543696).

Counsel also notes that the salaries of four managers working at the two assembly plants in the Dominican Republic are affected by our determination on this issue. Two of the managers are identified as the plant managers of the two facilities and as citizens of the Dominican Republic. The other two managers are described as plant industrial engineers, one of whom is identified as a citizen of Mexico. No information on the nationality of the second plant industrial engineer has been provided.

In a memorandum to this office dated March 11, 1987, you advise that a review of the audit workpapers and information furnished in the reconsideration request confirms that, contrary to the information provided in the original internal advice request, the portion of the managers' salaries paid by the importer is recorded in the importer's own books of account. In addition, while you concede that the assemblers maintain certain specific financial records, you state that:

> * * * the assemblers do not maintain records such as revenue or sales accounts and equity accounts which are representative of an accounting system and are necessary to an accounting system under generally accepted accounting principles.

Therefore, you assert that since the assemblers do not themselves maintain separate accounting systems which comply with generally accepted accounting principles (GAAP), dutiable costs must be obtained from the importer's own books of account. You also appear to

indicate that the accounts maintained by the importer (separate from its own general ledger accounts) which "mirror" the expenses incurred by the assemblers do not record the portion of the managers' salaries paid by the importer.

Although we assumed in our March 3, 1986, ruling that the imported assembled merchandise involved in case #2 was being appraised under transaction value, information furnished by counsel for the importer indicates that the merchandise actually is being appraised under computed value. Therefore, for purposes of this memorandum, we are assuming that computed value is the proper basis of appraisement for the subject merchandise.

Based on the limited information available to us concerning the financial accounts maintained by the assemblers in the Dominican Republic, and in the absence of information on the generally accepted accounting principles (GAAP) applied in that country, we are unable to determine whether those accounts are, in fact, maintained in accordance with GAAP. However, even without a determination on that issue, we believe that there is sufficient information before us to determine the dutiability of the portion of the managers' salaries paid through the importer's U.S. bank account. There is, of course, no dispute that the portion of the salaries paid by the assemblers is dutiable as part of computed value.

As we stated in the March 3, 1986, ruling, TAA #46 involved the dutiability under computed value of the salaries of various U.S. resident employees of the importer who worked at a related foreign assembly facility but were essentially paid by the importer rather than the assembler. Because these salary costs were not reflected on the assembler's accounting records as an expense of doing business, and did not fall within the statutory definition of the term "assists," we held that these costs were not includable in the computed value of the imported merchandise.

The basis for our determination in the March 3, 1986, ruling that TAA #46 is not controlling in regard to the issue before us was our understanding that the portion of the salaries paid by the importer is reflected as an expense in the commercial accounts of the assemblers. However, counsel for the importer and your office apparently now agree that this portion of the salaries is recorded in the importer's own general ledger accounts, and is not recorded in either the financial accounts maintained by the assemblers or in the separate accounts maintained by the importer which "mirror" the assembler's accounts. Under these circumstances, it is clear that the portion of the managers' salaries paid by the importer is not includable in computed value as part of the "cost or value of materials and fabrication" or as part of the "amount for profit and general expense." We believe this to be true regardless of what commercial accounts are used as the basis for calculating these statutory elements of computed value.

Thus, the only issue to be resolved is whether the portion of the salaries paid by the importer is includable in computed value as an assist. In our opinion, TAA #46, as well as TAA #4 and 20, require the conclusion in this case that the services performed by the concerned managerial personnel do not fall within the statutory definition of the term "assists." Therefore, the salary costs incurred by the importer with respect to these managers are not includable in computed value as assists. This conclusion presupposes that the functions performed by the personnel in question are exclusively managerial in nature.

(C.S.D. 88-34)

Valuation: Transaction Value, the inclusion of the "waste factor" in the price actually paid or payable.

Date: September 19, 1988
File: CLA-2 CO:R:C:V
544082 EK
Category: Valuation

AREA DIRECTOR OF CUSTOMS
JFK Airport Area
Jamaica, New York

Re: Decision on Application for Further Review of Protest Nos. 1001-6-007729, 1001-6-005758

DEAR SIR:

This is in reference to the above-noted protests filed on behalf of Mori-Lee Associates (hereinafter referred to as importer), in connection with the appraisement of imported merchandise pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(b)).

Facts:

The importer purchases wedding gowns from a manufacturer in Taiwan and imports them into the United States. With respect to the entries in question, the importer purchased fabric and trim and resold them to the manufacturer in Taiwan at a price less than that paid by the importer. The Taiwanese manufacturer then utilized the fabric and trim in producing the final imported product sold to the importer.

During the manufacturing process, it was discovered that a portion of the fabric was defective and could not be used to produce the finished garments. Therefore, the manufacturer charged the importer a "waste factor" which was approximately equal to five or ten percent of the actual fabric cost of the garments.

In addition, the manufacturer charged a financing fee to the importer. This was due to the large expenditure by the manufacturer for the purchase of the fabric and trim in advance of the manufacture and shipment of the final product. The importer states that it agreed to pay a 5% or 8% financing fee to the manufacturer.

Issues:

Whether the amount paid by the importer to the manufacturer to account for the defective fabric previously sold to the manufacturer by the importer is included in the "price actually paid or payable" for the final imported product.

Whether the financing fee charged by the manufacturer to the importer is to be included in the "price actually paid or payable" for the final imported product.

Law and Analysis:

The preferred method of appraisement, transaction value, is defined in section 402(b) of the TAA as:

> * * * the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to * * * the value, apportioned as appropriate, of any assist * * *.

The fabric provided to the manufacturer by the importer at a reduced cost is clearly encompassed by the definition of an assist which includes "materials, components, parts, and similar items incorporated in the imported merchandise." *See,* section 402(h)(1)(A)(iii) of the TAA. If the assist was acquired by the importer from an unrelated seller, the value of the assist is the cost of acquisition, including the transportation costs to the place of production.

It is important to note that the statutory language in section 402(h) of the TAA which requires that the assist be supplied by the buyer free of charge or at a *reduced cost,* is met by the mere fact that the buyer is paying for the expense incurred in transporting the assist to the place of production.

The importer states that since the defective fabric was discarded and never used by the manufacturer, it was not incorporated into the final imported product as required by the above definition of an assist. Headquarters Ruling No. 543093 dated April 30, 1984, states the following:

> * * * components which are destroyed, scrapped, or lost, and which are not physically incorporated into the imported article are not assists under the TAA.

If this were the issue presented, we could agree that the *discarded* fabric does not constitute an assist since it is not incorporated into the final imported product. However, the Taiwanese manufacturer and the importer chose not to do business in this manner. Rather than claim an allowance with respect to the discarded fabric in de-

termining the value of the assist, the manufacturer added an amount to the "price actually paid or payable" by the buyer. The manufacturer chose to recoup the loss of that fabric by adding a certain percentage to the price of the final imported product. The fee is merely a cost of doing business which the manufacturer included in their price to the buyer.

There is no authority in the TAA to exclude that amount from the "price actually paid or payable" from the buyer to, or for the benefit of, the seller.

Please note that section 402(b)(1) of the TAA provides that the price actually paid or payable for imported merchandise shall be increased to reflect the value of an assist only to the extent that such amount is not otherwise included in the price actually paid or payable. Therefore, if the manufacturer in this case is recouping the expense of the purchase of the fabric from the importer by adding that amount to the final price actually paid or payable, then this section applies and the value of the assist is not added to the price actually paid or payable since it is already included in the price paid. If this is the case, then the same analysis described above applies in concluding that the addition of the "waste factor" to the price actually paid or payable is proper, *i.e.*, there is no authority in the TAA to deduct that cost from the price paid by the buyer.

The second issue involves the dutiability of the interest charges paid by the buyer to the Taiwanese manufacturer. With regard to this issue, T.D. 85-111 dated July 17, 1985, is pertinent. In that decision, Customs stated that interest payments, whether or not included in the price actually paid or payable for imported merchandise, should not be considered part of dutiable value provided the following criteria are satisfied:

(1) The interest charges are identified separately from the price actually paid or payable;

(2) The financing arrangement in question was made in writing;

(3) Where required by Customs, the buyer can demonstrate that

—the goods undergoing appraisement are actually sold at the price declared as the price actually paid or payable, and

—the claimed rate of interest does not exceed the level for such transaction prevailing in the country where, and at the time, when the financing was provided.

From the information that you have provided, there is nothing to indicate that any of the above criteria are not satisfied. It appears as if there is no dispute that the interest charges paid by the buyer are properly excluded from the transaction value of the imported merchandise.

Holding:

In view of the foregoing, the protests should be denied with respect to the issue regarding the inclusion of the "waste factor" in the price actually paid or payable. As indicated above, the fee is properly included in the price actually paid or payable.

The protests should be granted with respect to the issue regarding interest charges. The payments made by the buyer for the interest charges are not part of the price actually paid or payable.

A copy of this decision should be attached to the Form 19, Notice of Action, to be sent to the protestant.

(C.S.D. 88-35)

Valuation: The dutiability of royalty payment.

Date: August 31, 1988
File: CLA-2 CO:R:C:V
544129 EK
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
Chicago, Illinois

Re: Decision on Application for Further Review of Protest No. 3901-7-000473

DEAR SIR:

This protest was filed against your decision in the liquidation of Entry No. 64092 dated January 9, 1987, made by (importer's name) (hereinafter referred to as importer). The importer is disputing the inclusion of a royalty payment in the transaction value of the imported merchandise pursuant to section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (TAA; 19 U.S.C. 1401a(b)).

Facts:

The importer is a manufacturer of pharmaceutical products in the United States. The royalty payments at issue in this case are made to (licensor's name) . (hereinafter referred to as licensor). The seller in the transaction is (seller) , a (country) corporation. The licensor and seller are related within the meaning of section 402(g) of the TAA. The agreement provides for the importer to pay a royalty to the licensor for the use and sale of a drug called DDAVP. The amount owed to the licensor is reduced by payments made to an unrelated company in the United States (also unrelated to the seller) who was originally involved in the early development of the product. These payments, when made, reduce the amount owed to the licensor.

The license agreement provides for an exclusive right and license to use and sell the license products within the United States. The amount of the royalty is 5% of the importer's net sales. The royalty is payable as long as the patent rights continue. The licensor further agrees to undertake litigation, at its expense, to stop others from infringing on the rights conveyed by the agreement.

The importer further acquired the right to manufacture the drug in the United States if the manufacturer could not fulfill the requirements in the supply agreement. This, however, does not relieve the obligation to pay the royalty for sale and use to the licensor. The importer may also use the drug for its own purposes, *i.e.*, give away samples without paying a royalty.

The agreement further provides for the importer to use know-how possessed by the licensor. It covers know-how in existence at the time of the contract as well as future know-how. The purpose of this is to keep the importer connected with developments and test results in alternative dosage forms of the product.

Issue:

Whether the royalty payments made by the importer to the licensor are to be included in the transaction value of the imported merchandise.

Law and Analysis:

Transaction value is the preferred method of appraisement and is defined in section 402(b) of the TAA as:

> * * * the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to * * * any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States * * *

An addition for a royalty fee paid by the buyer will be made to the "price actually paid or payable," unless the buyer establishes that such payment is distinct from the price for the imported merchandise, and that it is not a condition of the sale of the imported merchandise.

In this case, it appears as if the royalties at issue are not a condition of the sale of the imported merchandise. The payment owed is paid for rights which are separate and apart from the right of ownership on payment of the purchase price. The royalty payments are triggered upon the resale of the product rather than the importation of the product.

In a similar situation, Headquarters ruled that royalty payment by the importer to the licensor for the use, sale, and manufacture of the product in the United States was not part of the transaction value of the imported merchandise. In that case, the payment was not a condition of the sale nor was it tied to the importation of the product. *See*, Headquarters Ruling No. 544061 dated May 27, 1988.

Holding:

In view of the foregoing, it is our conclusion that the payments made by the importer pursuant to the royalty agreement at issue are not part of the transaction value of the imported merchandise within the meaning of section 402(b)(1)(D) of the TAA. Please grant the protest and attach a copy of this decision to the Form 19, Notice of Action, to be sent to the protestant.

(C.S.D. 88-36)

Valuation: The dutiability of merchandise shipped through a foreign trade zone.

Date: September 26, 1988
File: CLA-2 CO:R:C:V
544190 EK
Category: Valuation

SPECIAL AGENT IN CHARGE
Kennedy Airport Area
Jamaica, New York

Re: Ruling Request Regarding Shipment of Foreign Fabric From a Foreign Trade Zone

DEAR SIR:

This is in response to your memorandum of March 29, 1988, requesting internal advice regarding merchandise shipped through a foreign trade zone.

Facts:

You state that a United States company (hereinafter referred to as company A) purchases fabric from a foreign vendor and has it shipped directly to a U.S. foreign trade zone. The fabric is then given free of charge to a second United States company (hereinafter referred to as company B) who is unrelated to company A. You indicate that company B may partially process the fabric in the foreign trade zone prior to exporting it to its own related foreign manufacturer (hereinafter referred to as company C).

The fabric is then assembled into finished garments by company C. The finished garments are then sent back to the United States and entered by company B, the importer of record. Company C is paid by company B for services rendered in assembling the merchandise. Subsequent to entry into the United States, company B sells the finished garments to company A, the original purchaser of the uncut fabric. No reimbursement is made by company B to company A for the furnishing of the fabric.

Issue:

Whether transaction value pursuant to Section 402(b) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. 1401a(b); TAA), is applicable in appraising the final imported product and if so, what is to be included in determining the transaction value.

Law and Analysis:

Transaction value, the preferred method of appraisement, is defined as "the price actually paid or payable" for merchandise when sold for exportation to the United States, plus certain additions including the value of any assist. With respect to assembled merchandise, section 152.103(a)(3) of the Customs Regulations [19 CFR 152.103(a)(3)] states the following:

> The price actually paid or payable may represent an amount for the assembly of imported merchandise in which the seller has no interest other than as the assembler. The price actually paid or payable in that case will be calculated by the addition of the value of the components and required adjustments to form the basis for the transaction value.

In determining the transaction value of imported merchandise, the value, apportioned as appropriate, of any assist will be added to the "price actually paid or payable." In this case, the fabric is supplied to company B, without charge, by company A. Company B then supplies the foreign assembler, company C, with the fabric. The value of the fabric should be added to the "price actually paid or payable" by company B to its related party, company C. To the extent that the fabric is "partially" processed in the foreign trade zone, such is included in determining the value of the assist.

The value of the assist includes transportation costs to the place of production. *See,* 19 CFR 152.103(d)(1). Therefore, all costs incurred in transporting the fabric to company C's assembly plant are included in determining the value of the assist. This includes costs incurred in transporting to the foreign trade zone, as well as those incurred transporting the fabric from the foreign trade zone to the assembler's plant.

Before a determination can be made regarding the applicability of item 807.00, Tariff Schedules of the United States, to the imported finished garments, more detailed information is needed regarding the processing of the fabric performed in the foreign trade zone. *See,* 19 CFR 10.14(b).

You further inquire as to whether the transactions between the foreign assembler, company C, and company B are considered arms-length transactions. This becomes an issue in determining whether the price established between the parties is influenced by the relationship. The relevant provision with regard to related parties states the following:

> The transaction value between a related buyer and seller is acceptable * * * if an examination of the circumstances of the sale of the imported merchandise indicates that the relationship between such buyer and seller did not influence the price actually paid or payable. *See*, section 402(b)(2)(B).

In determining whether the relationship between the parties influences the price of imported merchandise, if it is shown that the buyer and seller, albeit related, buy and sell from one another as if they are not related, this indicates that the price is not influenced by the relationship between the parties, and appraisement pursuant to transaction value is proper. If the price is determined in such a manner which is consistent with the normal pricing practice of the industry, or with the way the seller deals with unrelated buyers, then it is considered not to have been influenced by the relationship between the parties.

Therefore, in this case, if it appears that the fee charged by company C to its related party, company B, to assemble the merchandise fits within the above criteria, then the transactions are considered to be at arms length.

Your final question pertains to whether the mark-up in value in the sale between company B, the importer of record, and company A, the original purchaser of the fabric and the ultimate purchaser of the final product in the United States, should be considered in appraising the merchandise. The sale between company B and company A appears to be a domestic sale in the United States and should not be considered in determining transaction value.

It should be noted that even though the information submitted is somewhat hypothetical in nature, we have attempted to provide your office with as much guidance as possible. Nonetheless, a change in any particular fact could change our response.

(C.S.D. 88-37)

Valuation: The correct application of the GSP country of origin criteria to land mobile radios and radar detectors.

Date: September 19, 1988
File: CLA-2 CO:R:C:V
554850 DBI
Category: Valuation

DISTRICT DIRECTOR OF CUSTOMS
Chicago, Illinois 60607

Re: Request for Internal Advice Regarding GSP Country of Origin Criteria of Land Mobile Radios and Radar Detectors

DEAR SIR:

This is in response to a memorandum of November 17, 1987, from your office concerning the requested internal advice ruling by Thomas J. O'Donnell, Esq., on behalf of Uniden Corporation, dated June 18, 1987. The request concerns the correct application of the Generalized System of Preferences (GSP) country of origin criteria to land mobile radios and radar detectors from Taiwan.

Facts:

The issue in this case arose when your office questioned the GSP duty-free eligibility of the subject merchandise. A review by your office of the applicable Form A's showed that the importer incorrectly calculated the country of origin value-content percentages for the merchandise on the basis of ex-factory prices rather than FOB Taiwan prices. Applying the higher FOB appraised values, many of the items were found not to meet the minimum 35 percent Taiwanese origin percentage necessary to qualify for GSP duty-free treatment.

The importer does not contest application of the higher FOB appraised values nor does he dispute that, as a result, many of the items fall below the minimum 35% value added requirement. However, he claims that the subject merchandise includes material from outside of Taiwan that undergoes a double substantial transformation and, as a result, its value may be included in the Taiwanese origin percentage. You state that your office is inclined to accept the claim for substantial transformation except for the fact that the origin percentage established by such a finding would contradict those already certified by the Taiwan certifying authority.

The manufacturing operations involved in the production of land mobile radios and radar detectors are as follows:

> *The parts receiving depot.*—All incoming components go to this depot and are logged in, counted, quality control tested and then arranged by lot into a proper bin. The components are then arranged in trays and assigned to a worker who is located at a specific assembly station. Components are sent to the appropriate section (mounting, subassembly, wiring or adjustment).
>
> *Mounting section.*—This is where discrete components are assembled onto printed circuit boards. The boards are masked to prevent adhesion of solder in undesired locations. The components are then soldered and/or glued into place and leads are trimmed off by circular saws. The soldering operations include preheating the PCB's prior to entering the solder bath, a solder bath, movement over rollers to remove excess solder, a second and final solder bath which applies a thin smooth solder layer, quality control testing and removal of excess solder. The components on top of the board are then straightened and the board is moved through various stations via conveyor belting where each section of the board is examined to assure placement of

components and soldering. The PCB's are then quality control checked for proper electrical functioning and then sent to the subassembly section.

Subassembly section.—The PCB's received from the mounting section then are prepared for assembly. Additional components are assembled by hand to the boards, including the attachment of lead wires, capacitors, jacks, integrated circuits, and heat sinks. At this stage, the printed circuit boards become completed printed circuit board assemblies.

Wiring section.—The wiring section essentially completes the product. The various subassemblies (PCBA) are combined together and placed in the housing, various switches are assembled, input-output plugs are added, the main PCB is attached to the housing, LED's are inserted, and speakers are added. Again, the unit is quality control checked to assure that the unit, with all subassemblies, is operating correctly.

Adjustment section.—This involves the final assembly, testing, and packaging of the product. The microphone is installed, the front and rear cases are screwed to the frame, and the brand name is affixed to the housing. The completed product is fully tested to assure that it is operating correctly and conforms to all specifications.

Land mobile radios typically take from 250 to 400 minutes of actual assembly processing time to produce while radar detectors take from 83 to 112 minutes of actual assembly processing time to produce.

Issue:

Whether the operations performed on the component parts of land mobile radios and radar detectors result in a dual substantial transformation, thereby enabling the cost or value of the constituent material to be counted toward the 35 percent value-content requirement for purposes of the GSP.

Law and Analysis:

Section 10.176(a) of the Customs Regulations (19 CFR 10.176(a)), provides that an article may qualify for duty-free treatment under the GSP only if the sum of the cost or value of the materials produced in the beneficiary developing country (BDC), plus the direct costs of processing operations performed in the BDC, are not less than 35 percent of the appraised value of the imported article.

Section 10.177(a), Customs Regulations (CFR 10.177(a)), provides that the words "produced in the beneficiary developing country" refer to the constituent materials of which the eligible article is composed which are either (1) wholly the growth, product, or manufacture of the BDC, or (2) substantially transformed in the BDC into a new and different article of commerce. In the case of materials imported into a BDC (such as the component parts in the instant case),

the cost or value of that material may be counted toward the 35 percent requirement only if the imported material is first substantially transformed into a new and different intermediate article of commerce which is then used in the BDC in the production of the final imported article.

Since the merchandise at issue is to be produced using component parts which are not the product of Taiwan, it is clear that they are not wholly the growth, product, or manufacture of that beneficiary country. It is Mr. O'Donnell's position that the production of a number of PCB subassemblies, and the subsequent assembly of the subassemblies into the final product, each constitutes a substantial transformation. Thus, he argues that the cost or value of the subassemblies may be counted toward the 35 percent requirement for purposes of determining whether the imported land mobile radios and radar detectors are eligible for duty-free treatment under the GSP.

The test for determining whether a substantial transformation has occurred is whether an article emerges from a process with a new name, character or use, different from that possessed by the article prior to processing. *See Texas Instruments Inc.* v. *United States,* 69 CCPA 152, 681 F.2d 778 (1982).

In the present situation, in order for the imported component parts to be counted toward satisfying the 35 percent value-content requirement, a finding of a *double* substantial transformation must be made. The double substantial transformation concept has its origins in the administrative and judicial interpretations of 19 CFR 10.177(a). *See* T.D. 76–100, 10 Cust. Bull. 176 (1976) and C.S.D. 85–25 (071827), 19 Cust. Bull. 544 (1985).

Customs application of the double substantial transformation requirement in the context of the GSP received judicial approval in *The Torrington Company* v. *United States,* 8 CIT 150, 596 F.Supp. 1083 (1984), aff'd 764 F.2d 1563 (1985). The court, after affirming Customs application of the double substantial transformation concept, said:

> Regulations promulgated by Customs define the term "materials produced" to include materials from third countries that are substantially transformed in the BDC into a new and different article of commerce. 19 CFR 10.177(a)(2). It is not enough to transform substantially the non-BDC constituent materials into the final article, as the material utilized to produce the final article would remain non-BDC material. There must first be a substantial transformation of the non-BDC material into a new and different article of commerce which becomes "material produced," and these materials produced in the BDC must then be substantially transformed into the new and different article of commerce. It is noted that 19 CFR 10.177(a) distinguishes between "merchandise produced in a BDC" and the cost or value of the "materials produced in the BDC" which demonstrates

the contemplation of a dual substantial transformation requirement.

We have previously held in a ruling dated June 28, 1985 (HQ 553217), that the process of incorporating component parts manufactured in Romania and component parts imported into Romania onto a printed circuit board subassembly constituted a processing sufficiently complex so as to result in the subassembly being considered a substantially transformed constituent material of an imported matrix printer. We took into account the number of steps, the careful attention to detail and quality control, and the large number of discrete components assembled onto the PCB.

We also held that the PCB subassembly represented a distinct article, different from both the components from which it was made and the matrix printer into which it was incorporated and, therefore, the assembled PCB constituted an intermediate article within the meaning of 19 CFR 10.177(a). In that case, the cost or value of the PCB subassemblies were counted toward the GSP 35 percent value-content requirement. See also C.S.D. 85-25.

In the present case, we find that the manufacture of the PCB subassemblies constitutes a substantial transformation. The separate components imported into Taiwan acquire new attributes, and the PCB subassembly differs in character and use from the component parts of which it is composed. The production of the subassembly involves substantial operations (cutting, mounting, soldering, quality control testing), increasing the components' value and endowing them with new qualities which transform them into an article with a new distinct commercial identity.

We also find that the further complex assembly of the PCB subassemblies, creating the final product, results in a second substantial transformation. The further assembly operation of the PCB's changes the character of the constituent material (PCB subassemblies) to enable it to become land mobile radios and radar detectors. The PCB's are separate articles of commerce that manufacturers wish to buy and sell for their own purposes. As a result of the final assembly of the PCB's into land mobile radios and radar detectors, a finished product emerges with a separate identity and, therefore, is a new article of commerce.

Additionally, the further complex assembly of the PCB subassemblies involves a large number of components and a significant number of different operations, requires a relatively significant period of time as well as skill, attention to detail, and quality control, and results in significant economic benefit to the beneficiary developing country from the standpoint of both the value added to each PCB and the overall employment generated by the operations.

Finally, these assemblies are not the type of "pass-through" operations which Congress intended to prohibit from receiving GSP benefits. "Keep[ing] in mind the GSP's fundamental purpose of fostering industrialization in beneficiary developing countries," we be-

lieve that the operations performed in this instance are the type of substantial operations contemplated by the GSP statute. See *Torrington* v. *United States*, 764 F.2d at 1571.

Regarding the issue of certification of the Form A, section 10.173(a) of the Customs Regulations (19 CFR 10.173(a)), as amended on July 9, 1986, reads as follows:

> The Form A shall be properly completed and signed by the exporter of the merchandise, or other appropriate party having knowledge of the relevant facts. The Form A need not be certified by the designated governmental authority of that country unless that country has a verification agreement with the U.S. Customs Service.

Since Taiwan does not have a verification agreement with the U.S. Customs Service, then your office may accept corrected Form A's completed and signed by the exporter or appropriate party. They need not be certified by the Taiwan government.

Holding:

The component parts imported into Taiwan and subject to the processing described in the importer's submission, may be regarded as a material produced in Taiwan within the meaning of 19 CFR 10.177, and its value may be included towards the satisfaction of the GSP's 35 percent value-content requirement.

(C.S.D. 88-38)

Marking: Country of origin marking of a T-shirt bearing the trademark "Perry Ellis America".

Date: July 18, 1988
File: MAR-2-05 CO:R:C:V
731314 LR
Category: Marking

DIANE L. WEINBERG, ESQ.
RODE & QUALEY
295 Madison Avenue
New York, NY 10017

Re. Country of origin marking requirements for a T-shirt bearing the trademark "Perry Ellis America"

DEAR MS. WEINBERG:

This is in response to your request dated March 15, 1988, for a country of origin marking ruling on behalf of your client, Perry Ellis Division of Manhattan Industries, Inc. Specifically, you request a ruling that the submitted sample T-shirt is legally marked and falls

within the exception for trademark articles under section 134.47, Customs Regulations.

Facts:

The sample garment, a product of Zimbabwe, is a short-sleeved black T-shirt with a rib knit neckband. The words "Perry Ellis America", a registered trademark of your client, appear in two locations on the T-shirt: on the outside of the shirt several inches above the hemline on the left-hand corner of the front panel and on the inside of the shirt on a textile label sewn into the center of the neck midway between the shoulder seams. The trademark on the front of the garment is prominently displayed in large white letters (approximately 1/4" in height and width); the trademark on the neck label appears in blue letters approximately 2½"×1¼". The words "Made in Zimbabwe" appear in smaller black letters (approximately 1/16" in height and width) on another smaller textile fabric label (approximately 1"×3/4"). The country of origin label is sewn into the bottom right hand corner of the "Perry Ellis America" label. The country of origin appears below the fabric content and the RN number. A third label indicating the size (in this case "M") is sewn below the "Perry Ellis America" label to the left of the country of origin label.

Issue:

Whether the country of origin label on the sample T-shirt is conspicuous within the meaning of section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), and section 134.47, Customs Regulations (19 CFR 134.47)?

Law and Analysis:

As you are aware, 19 U.S.C. 1304 requires that articles of foreign origin imported into the United States be legibly, conspicuously and permanently marked to indicate the country of origin to the ultimate purchaser in the U.S. As provided in 19 CFR 134.41, the marking is considered conspicuous if the ultimate purchaser is able to find the marking easily and read it without strain. Special marking requirements are applicable when the work "America" appears on the article as part of a trademark. In such case, 19 CFR 134.47 provides that the article shall be legibly, conspicuously and permanently marked to indicate the name of the country of origin of the article preceded by "Made in," "Product of," or other similar words, *in close proximity to the word "America" or in some other conspicuous location.* (emphasis added)

The Customs Service has determined that country of origin marking appearing on the inside center of the neck of a shirt midway between the shoulder seams or in that immediate area is conspicuous within the meaning of 19 U.S.C. 1304 and is, in fact, the requisite location. *See* T.D. 54640(6). In T.D. 71–264(3), Customs ruled that marking of trouser, jeans and slacks should be made by means of a permanent label affixed in a conspicuous location on the garments, such as the inside of the waistband.

In HQ 729494, dated May 6, 1986, Customs ruled that a pair of slacks was not conspicuously marked where the country of origin label appeared inches beneath the waistband and far removed from the waistband's center seam and the brand name label. In that case, the lettering was mimiscule by comparison with the brand name label, and the country of origin was "lost" in other wording regarding the material content and the lot number contained thereon. In the same ruling, a jacket was found not to be properly marked because the label, although located in the center of the neck area, was located behind and beneath the brand label so that only about half the country of origin was visible.

In HQ 729495, dated April 21, 1986, Customs ruled that certain men's shirts were not conspicuously marked as to country of origin. In that case, the shirt had two labels permanently affixed to the inside of the shirt collar. One label was placed in the middle of the back of the collar, and contained the inscription "Fabric Woven in U.S.A.", in white lettering approximately 1/16" in height and width, on a black background. The second label was sewn into the collar 5/8" below and 3/4" to the right of the first label, and contained the inscription "Assembled in Honduras" in block letters approximately 1/16" high and 1/32" wide. Headquarters found that the shirts in question did not satisfy the marking requirements because the fabric label was not affixed on the inside center of the neck midway between the shoulder seams or in that immediate area as required by T.D. 54640(6) and because the fabric label with the country of origin was significantly off to the side and partially obscured by the collar. (The marking also did not satisfy the requirements of 19 CFR 134.46, which are not applicable here.)

In determining whether or not a particular country of origin marking is sufficiently conspicuous, Customs will take into account the presence of words or symbols on the article which may mislead the ultimate purchaser as to the country of origin. *See* HQ 729096, dated January 2, 1986 (In light of prominently displayed symbols indicative of a country other than the country of origin on both the imported article and the container, the country of origin label which appeared in a location of the shoe which normally would have been sufficiently conspicuous was not acceptable. Customs found that the container also had to be conspicuously marked with the country of origin).

The question here is whether or not the country of origin label is the neck area is sufficiently conspicuous in view of the two references to the "Perry Ellis America" trademark described above. While the country of origin label does not appear in close proximity to the "Perry Ellis America" trademark on the front of the garment, we find that it appears in "some other conspicuous location" and therefore satisfies the requirements of 19 CFR 134.47. Although the "Made in Zimbabwe" marking is not as prominent as the two references to "Perry Ellis America", we are of the opinion that the

country of origin marking is conspicuous enough so that the ultimate purchaser would locate it easily upon a casual inspection and would not be misled by the two references to "America." This is attributable to the fact that the country of origin information appears in its usual location (in the inside center of the neck midway between the shoulder seams) and close to the fabric content and size designation, other important consumer information. The country of origin label on the submitted sample is also more conspicuous than the origin labels that appeared on the garments described above which were found to be unacceptable. The label here is not obscured by another label; nor is it off to the side or inches below the brand label. We also note that the two references to "America" are not as prominent as the misleading symbols which appeared on the shoes and shoe boxes in HQ 729096.

Despite our determination that the country of origin on the submitted sample is conspicuous, a few caveats must be noted. Since the country of origin label is below the brand name label, the garment could easily be packaged in a way so that the brand label is visible and the country of origin label is not. If the country of origin is obscured in any way by packaging or otherwise prior to the time of sale to the ultimate purchaser, the marking would be unacceptable. In such circumstances, the ultimate purchaser would be misled by the word "America" which is prominently displayed on the garment. In addition, any change to the country of origin label to make it less conspicuous (*e.g.*, smaller letters, placement lower down) would render the marking unacceptable.

Holding:

The submitted T-shirt, which is marked "Made in Zimbabwe" in the center of the neck, immediately below the brand name "Perry Ellis America" label is legally marked pursuant to 19 U.S.C. 1304 and 19 CFR 134.47.

(C.S.D. 88-39)

Copyright: Infringement of "Garfield" (the cat).

Date: September 9, 1988
File: CPR-3 CO:R:C:V
731626 A
Category: Copyright

JAMES L. BIKOFF, ESQ.
BAKER & HOSTETLER
1050 Connecticut Avenue NW
Washington, D.C. 20036

Re: Copyright Infringement—Advisory Opinion "GARFIELD" Plush Toy and "GARFIELD" Comic Strip

DEAR MR. BIKOFF:

Your letter of July 25, 1988, submitted samples and materials in support of your request for a ruling that certain plush dolls constitute infringing importations within the meaning of 17 U.S.C 603 and 19 CFR 133.42.

Facts:

Customs Issuance 84-99, dated September 7, 1984, recorded the following copyrights for protection against importations of piratical copies:

"GARFIELD (Plush toy resembling pre-existing illustration by same)"—Soft sculpture. Registration No. VA 100-331, published June 2, 1981.

"UNITED FEATURE COMICS—VOL 40—NO. 44." Registration No. TX 501-787, published October 29, 1979.

"UNITED FEATURE COMICS—VOL 41-NO. 17." Registration No. TX 543-074, published April 28, 1980.

"UNITED FEATURE COMICS—VOL 42—NO. 12." Registration No. TX 658-629, published March 16, 1981.

The copyright owner, United Feature Syndicate, Inc. ("UFS"), claims that its "GARFIELD THE CAT" copyrights and in particular its plush "GARFIELD" doll, are being infringed by importations of plush toys with suction cups which are made in Korea. One of the questioned samples is an 8" high doll bearing a label reading "STICK 'EM UP," 'on any smooth surface, Home-Car-Office'.

The version of the copyrighted doll submitted as a sample also has suction cups on its four paws. These items are of the popular kind currently often seen stuck on the inside of automobile windows.

Issue:

Do plush cat dolls with suction cups attached to their paws, as illustrated by samples submitted, constitute infringing importations of copyrighted "GARFIELD" items?

Law and Analysis:

Section 602(b) of the Copyright Law (17 U.S.C. 602(b)), prohibits the importation of articles infringing a copyright and section 603(c) provides that such articles are subject to seizure and forfeiture in the same manner as property imported in violation of the Customs revenue laws. However, the articles may be returned to the country of export whenever it is shown to the satisfaction of the Secretary of the Treasury (Customs) that the importer had no reasonable grounds for believing that his or her acts constituted a violation of law (19 CFR 113.47)).

The basic test for determining whether there has been an infringement of a copyright is whether substantial similarity exists between two works. The appropriate test for determining whether substantial similarity is present is whether an average lay observer would recognize the alleged copy as having been appropriated from

the copyrighted work, *Ideal Toy Corp.* v. *Fab-Lu Ltd.*, 360 F.2d 1022 (1966). The substantial similarity test was developed in order to bar a potential infringer from producing a supposedly new and different work by deliberately making trivial or insignificant variations in specific features of the copyrighted work.

Two steps are involved in the test for infringement. There must be access to the copyrighted work and substantial similarity not only of the general ideas but the expression of those ideas as well. The copyrights in question were published in 1979, 1980 and 1981 and thus have long been available to the public.

A side-by-side comparison of the samples demonstrates that the questioned articles exhibit the total concept and feel of the UFS version covered by copyrights recorded with Customs. Both dolls reflect the wry expression and heavy-lidded eyes typical of the well-known "GARFIELD" cartoon character. The contours of the full-faced head and ears of the compared items, and the plastic single piece construction of the eyes and nose, are substantially indistinguishable. Slight differences in height or size, or the fact that some items may have some variation in the pattern of stripes, would not exonerate copying.

Holding:

We are of the opinion that imported "stick-up" type dolls of the kind discussed above are prohibited entry into the United States as infringing the rights of the copyright owner and are subject to seizure and forfeiture under 17 U.S.C. 603 and 19 CFR 133.42. Pursuant to section 603 and 19 CFR 133.47, a district director of Customs may allow the return of the infringing articles to the country of export whenever he/she is satisfied that the imposter had no reasonable grounds for believing that his/her act of importation constituted a violation of law.

(C.S.D. 88–40)

Trademark: Possible infringement of trademarks of Nintendo of America, Inc.

Date: September 27, 1988
File: TMK-3 CO:R:C:V
731762 SO
Category: Trademark

JEFFREY D. KNOWLES, ESQ.
VENABLE, BAETJER, HOWARD & CIVILETTI
Suite 1200
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: "Video Shooter"—Possible Infringement of Trademarks Owned by Nintendo of America, Inc.—"NINTENDO," Trademark Issuance No. 83-284 Effective Nov. 25, 1983 (Trademark Registration No. 1,213,822 of Oct. 26, 1982)—"NINTENDO ENTERTAINMENT SYSTEM," Trademark Issuance No. 88-280 Effective May 17, 1988, (Trademark Registration No. 1,440,706 of May 26, 1987).

DEAR MR. KNOWLES:

Your letter of September 16, 1988, on behalf of Placo Products Company (Placo), a California toy manufacturer, requested a Headquarters ruling on whether the importation of one of its new toys, Video Shooter, would infringe the above referenced trademarks of Nintendo of America, Inc. (Nintendo).

Facts:

The ruling request concerns whether the appearance of the phrases "COMPATIBLE WITH NINTENDO ENTERTAINMENT SYSTEM," and "Nintendo is a registered trademark of Nintendo of America Inc." on the packaging for the Video Shooter is a non-infringing method of informing the consumer that the Video Shooter, a cordless infra-red controlled video gun, can be used with a competitor's product. Placo plans to manufacture the new toy abroad. A sample box and a letter containing legal arguments in support of your position that such use is non-infringing were submitted with your ruling request. Upon examination of the sample box, we noted that the phrase "COMPATIBLE WITH NINTENDO ENTERTAINMENT SYSTEM" appears on each of the six surfaces of the box along with the trademarks "PLACO TOYS" and "VIDEO SHOOTER" in large letters.

The question of whether the use of the phrases referred to above would infringe the Nintendo trademarks was referred to a Customs Import Specialist in New York in May, 1988, upon advice of Customs in Washington, D.C. Two months later, after meeting with Customs officers in New York, you were advised by New York that they lacked authority to issue the ruling. In view of this delay and the impending peak season for toy sales, you asked for priority consideration.

Issue:

Would the use of certain phrases on the package of the Video Shooter, to indicate its compatibility with the Nintendo Entertainment System, infringe any of the registered trademarks owned by Nintendo of America, Inc., which are recorded with the Customs Service for import protection pursuant to applicable regulations (19 CFR Part 133, Subpart A)?

Law and Analysis:

Section 42 of the Act of July 5, 1946 (commonly referred to as the Lanham Act, 60 Stat. 440, 15 U.S.C. 1124) prohibits the entry at any customhouse of the United States of articles of imported merchandise which shall copy or simulate a U.S. registered trademark, provided a copy of such trademark registration is filed with the Secretary of the Treasury and recorded in the manner provided by regulations (19 CFR 133.1–133.7). A "counterfeit trademark" is a spurious trademark which is identical with, or substantially indistinguishable from, a registered trademark (19 CFR 133.23a(a)).

Infringement of federally registered trademarks is governed by the test of whether defendant's use is likely to cause confusion, or to cause mistake, or to deceive. The Lanham Act seeks to prevent confusion as to the source of trademarked goods as well as their quality and genuineness. When comparing conflicting marks to determine whether or not they are confusingly similar, it is important to consider the impression the marks as a whole create on the average reasonably prudent purchaser.

Upon careful consideration of the arguments you presented and the cases cited in your letter, we are of the opinion that the phrases used on the box to indicate that Placo's Video Shooter is compatible with the Nintendo Entertainment System are a lawful reference to a competitor's product and are not confusingly similar to any marks of Nintendo. Our decision is based upon consideration of whether Placo's use of Nintendo's trademark serves a permissible functional purpose. A purpose is functional if it is essential to the use or purpose of the product or if it affects the cost or quality of the product.

"Generally, a competitor may not use another's registered trademark to sell its products without permission. A competitor can, however, use another's registered trademark to describe aspects of its own goods. 15 U.S.C. 1115(b)(4). Defendant Decipher, thus, has a legal right, under the Lanham Act, to use the TRIVIAL PURSUIT trademark to describe aspects of its FORTE products so long as it does not attempt to deceive consumers as to the origin of FORTE. It is, therefore, clear that FORTE may, on its package, state that it can be used to play with TRIVIAL PURSUIT." *Selchow & Righter Co.* v. *Decipher, Inc.*, 598 F.Supp. 1489, 1503 (1984).

"RC–I intended to make use of the Cusinarts name and trademark, without the latter's consent. Such use does not violate the Lanham Act, so long as misrepresentations are not made." *Cusinarts, Inc.* v. *Robot-Coupe International Corp.*, 580 F.Supp. 634, 637 (1984). "The district court had sufficient evidence before it to support its implicit conclusion at this stage of the proceedings that Remco's purpose in using the 'Masters of the Universe' trademark in selling its dolls was to describe to purchasers a use of its own product, and did not constitute a bad faith effort to deceive consumers into thinking they were buying a Mattel toy." *Mattel, Inc.* v.

Azrak-Hamway International, Inc., 724 F.2d 357, 361 (1983). We are of the opinion that the use of the phrase "COMPATIBLE WITH NINTENDO ENTERTAINMENT SYSTEM" by Placo on its box for the Video Shooter is not a misrepresentation and does not constitute a bad faith effort to deceive consumers.

Holding:

The imported boxes containing Placo's Video Shooter toy, bearing the phrases referred to above to indicate that it is compatible with the Nintendo Entertainment System would not be prohibited entry into the United States as infringing the trademarks of Nintendo of America, Inc. The boxes may be imported in unlimited quantities without restriction.

U.S. Customs Service

General Notices

OVERSTATEMENT OF CHARGES ON ENTRY DOCUMENTATION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of customs investigations of overstatement of charges on entry documentation.

SUMMARY: Entry documentation covering merchandise imported into the U.S. is required by law to set forth all charges upon merchandise. The actual amounts paid to freight and insurance companies, less any discounts, bonuses or rebates paid by the freight and insurance companies to the seller, must be reflected on the documents. It has come to the attention of Customs that many invoices set forth overstated freight and insurance charges as the invoices do not reflect the discounts, commissions, bonuses or rebates received by the shippers or manufacturers from the freight and insurance companies. This document notifies the public that Customs is currently investigating such practices.

EFFECTIVE DATE: December 6, 1988.

FOR FURTHER INFORMATION CONTACT: Robert Fischer, Office of Enforcement, U.S. Customs Service, 1301 Constitution Avenue, N.W. Washington, D.C. 20229 (202-566-6188).

SUPPLEMENTARY INFORMATION:

BACKGROUND

All invoices for imported merchandise are required by 19 U.S.C. 1481(a)(8), and § 141.86(a)(8), Customs Regulations (19 CFR 141.86(a)(8)), to set forth all the charges upon the merchandise itemized by name and amount, including freight, insurance, commission, cases, containers, coverings, and cost of packing. Pursuant to 19 U.S.C. 1481(a)(9), and § 141.86(a)(9), Customs Regulations (19 CFR 141.86(a)(9)), invoices must also set forth all rebates allowed upon exportation of the merchandise.

The importer of record is required by 19 U.S.C. 1484(a)(1)(B) to file such documentation as is necessary to enable the appropriate Customs officer to assess the proper duties on merchandise, collect

accurate statistics with respect to merchandise, and determine whether other applicable requirements of law are met. Such documents required by Customs include the entry summary, Customs Form 7501. Pursuant to § 141.61(e)(1), Customs Regulations (19 CFR 141.61(e)(1)), the applicable information required by the General Statistical Headnotes, Tariff Schedules of the U.S. (TSUS), shall be shown on the entry summary. General Statistical Headnote 1(a)(xiv) provides that when persons making customs entry of articles imported into the customs territory of the U.S. complete the entry summary, they shall include the aggregate cost, in U.S. dollars, of freight, insurance and all other charges, costs and expenses incurred in buying the merchandise from alongside the carrier at the port of exportation in the country of exportation and placing it alongside the carrier at the first U.S. port of entry.

It has come to the attention of Customs that some importers are overstating freight and insurance charges on entry documentation by not reflecting accurately discounts, commissions, bonuses or rebates received by the shippers or manufacturers from freight and insurance companies. This has resulted in undervaluation of imported merchandise as the value of the merchandise is determined pursuant to 19 U.S.C. 1401a as the total payment made by the buyer, exclusive of any costs, charges or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise. Customs has further learned that some shippers and manufacturers are receiving the excess monies and/or discounts in CIF and FOB prepaid transactions.

Pursuant to 19 U.S.C. 1485(a), every consignee making an entry is required to declare on the entry that the prices set forth in the invoice are true to the best of his knowledge and belief; that all other statements in the invoice or other documents filed with the entry, or in the entry itself, are true and correct; and that he will produce at once to the appropriate Customs officer any invoice, paper, letter, document or information received showing that any such prices or statements are not true or correct. Accordingly, overstating freight and insurance charges is a violation of 19 U.S.C. 1485(a). Violation of 19 U.S.C. 1485(a) could result in a penalty under 19 U.S.C. 1592.

The purpose of this notice is to notify the importing public that Customs is currently investigating the practice of overstating freight and insurance charges on import documents. Manufacturers, exporters, and importers who have engaged in the aforementioned practices are encouraged to make duty tenders and provide all pertinent information to U.S. Customs. These actions may be considered an extraordinary mitigating factor with respect to any

possible civil penalty action that might be commenced against the importer.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: November 10, 1988.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, December 6, 1988 (53 FR 49265)]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., November 23, 1988.

Subject: Guidelines for the Reporting of Imported Products in Various Textile and Apparel Categories

The Deputy Assistant Commissioner, Commercial Operations, has requested that the C.I.E. disseminate the following information:

Re: Executive Order 11651, dated March 4, 1972 (37 F.R. 4699)

Executive Order 11951, dated January 7, 1977 (42 F.R. 1453)

The attached guidelines have been developed and revised in accordance with the proposed Harmonized Tariff Schedule of the United States Annotated (HTSUSA) to insure uniformity, to facilitate statistical classification, and to assist in the determination of the appropriate textile categories established for the administration of the Arrangement Regarding International Trade in Textiles.

These guidelines supersede all previous material issued in this regard and are applicable in establishing the appropriate category designations for garments and other items included therein. They represent the present position of the Customs Service.

The Textile and Apparel Category Guidelines should be brought to the attention, and made available, to all interested parties.

For information or advice concerning the application of these guidelines, please contact the appropriate National Import Specialist, Commercial Operations Division, New York Seaport. Their main telephone number is (212) 466–5848 (FTS 668–5848).

RICHARD R. ROSETTIE,
Deputy Assistant Commissioner,
Commercial Operations.

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Foreword

In order to ensure proper administration of the various textile agreements and accuracy of the statistical data collected, the following guidelines have been established for the uniform application of the textile quota category system. These guidelines do not purport to take into account every possible fabric, construction, and styling combination, since, in wearing apparel especially, each season brings new styles. However, the uses to which most types of garments are put remain relatively constant as in trousers, raincoats, etc. As such, these guidelines are intended as indications of the types of construction and styling most likely to be encountered. Certain types of garments are so closely related in use, though, that the corresponding category designations seem to overlap. In such situations it should be remembered that the guidelines are to be used as an aid in determining the commercial designation and, hence, the classification of an article.

Apparel—Sex of wearer:

Distinguishing between male and female attire may present problems. Articles which cannot be identified as either men's or boys' garments or as women's or girls' garments are commonly referred to as "unisex" garments and are classifiable under the provisions for women's and girls' apparel.

Unisex garments are usually sold in both men's and boys' and in women's and girls' departments and stores. Garments which are only sold in men's or boys' departments or stores are usually not commonly worn by either sex and therefore are not unisex.

In determining whether a garment is identifiable as men's or boys', or as women's or girls', the following should be considered: 1) sizing, 2) construction, 3) styling, and 4) other factors such as packaging, labelling, etc. Little weight should be given to the consignee or ultimate retailer of a particular shipment or its invoicing. Other factors may be considered and any factor may be determinative by itself or in combination with one or more factors. Note that pullover shirts which button left over right will be considered men's or boys' shirts.

Definitions:

For the purposes of these guidelines, the following terms are defined below:

Babies'.—As provided for in headings 6111 and 6209, includes garments and clothing accessories for young children of a body height not exceeding 86 centimeters. Babies' sizes 0–24 months normally fall within that measurement. Garments and clothing accessories for young children of a body height exceeding 86 centimeter are classifiable in the appropriate provision for boys and girls.

Tailoring.—The shaping of a fabric into a garment so as to neatly fit the contours of the body by means of cutting, seaming and finishing. Fabrics with a high degree of elasticity, such as some sweater knits, are capable of shaping themselves to the contours of the body without additional work. Garments made from such fabrics requiring minimal cutting and sewing are not considered to be "tailored."

Midthigh.—The lowest point reached by the fingertips when the arms are placed at the sides of the body with the fingers extended. This may also be referred to as ¾ length.

What follows is not intended to be an exhaustive treatment of textile quota categories or statistical breakouts. It is simply an attempt to identify problem areas and insure greater uniformity in the classification of merchandise. Nor should it be considered an immutable document.

Category: Cotton 239
Wool........................ 439
Man-made................. 239
Other 839

These categories cover all knit and woven apparel and clothing accessories for young children of a body height not exceeding 86 centimeters.

Category: Cotton 363/369

Category designation: Cotton towels.

Towels are divided into four groups—dish, bar mop, shop, and all others. These towels may have a pile construction (usually terry or plush or a combination of the two) or be flat woven.

Dish towels (category 369) and hand towels (category 363) fall within the same size range, 15 to 18 inches wide and 24 to 32 inches long, and are sometimes difficult to distinguish from each other. With one exception, dish towels always have a design printed on them or woven or knit into them. The design may be in the form of pictures of fruit, kitchen utensils, chickens, etc., or may be checks, stripes, or similar patterns. The dish towels that usually do not have a design are light weight, plain woven, nonpile cotton towels that may be similar to, but readily distinguishable from, shop towels which are made from a much coarser fabric. These towels may be longer than the other dish towels.

Hand towels may be plain or patterned (containing decorative work or pictures). When patterned, they are almost always pile constructed. Distinctions between patterned hand towels and dish towels can usually be made based on the type of pattern or design. Kitchen-style motifs obviously would not be printed on bathroom towels. Where a *design* is susceptible of both kitchen and bathroom uses, the factor that may be determinative is what accompanying articles are in the same shipment (e.g., potholders with the same pattern or design will usually cause the articles to be classified as dish towels while bath towels of the same pattern or design will usually result in classification as other towels in category 363). In no instance will a hand towel be classified as a dish towel solely because it is accompanied by matching potholders or other kitchen articles. In the event that no clear distinction based on pattern, design, or otherwise can be made, the article will classified as an "other" towel in category 363 because it is readily susceptible to more than one use.

Articles combined into a set may be classified as a set, note 3(a)(b) and (c) of the General Rules of Interpretation. In most cases the towel would impart the essential character to a towel set, G.R.I. 3(b).

Bath mats, which are usually square or rectangular in shape and made from heavy terry fabric, are not considered towels since they are not intended to be used for a wiping or drying function. They are includable in category 369.

Shop towels (category 369) are dedicated to use in garages, filling stations, machine shops, etc., and are always plain woven nonpile construction, made from a coarse fabric, usually an osnaburg or similar low grade fabric, the average yarn number of which normally falls within the 3 to 12 range. However, some shop towels

are made from a heavier duck-type fabric. Shop towels may be square or rectangular in shape and usually vary in size from 16 to 30 inches wide and from 16 to 32 inches long. Shop towels are usually gray (greige) material, but may be colored, usually dull reds, blues, greens, and yellows.

Bar mops are rectangular in shape with either full or ribbed terry on both sides. While sizes may vary, only those bar mops which are 38 to 43 centimeters in width and 46 to 57 centimeters in length fall within category 369. Tolerances are not allowed. Bar mops not within the stated dimensions are included in category 363.

Category:	Cotton	333
	Wool	433
	Man-made	633
	Other	833

Category designation: Suit-type coats, men's and boys'.

Suit type coats must (1) be tailored, (2) have a full-frontal button or snap opening, (3) have sleeves (of any length), (4) be designated for wear over a lighter outer garment, and (5) have three or more panels (excluding sleeves), of which two are at the front, sewn together lengthwise. They may be waist length (Eisenhower jackets and other casual garments meeting the 3 panel requirement are not "suit-type jackets") or extend to mid-thigh. Sport coats and certain leisure jackets fall within these categories. Sport coats frequently have lapels, back vents, two lower patch or slash pockets, and one or two inner breast pockets. The bottom part of the front opening is usually rounded on single breasted models and straight on double breasted models. Leisure suit jackets come in a variety of styles, with lapels, two or more pockets (usually two or four), and no cuffs. Such features as elbow patches, simulated back belts and bi-swing gussets may be found on all of the above.

Coats which form the upper part of ensembles known commercially as "suits," such as athletic suits, rainsuits, hunting suits, camouflage suits, etc., are not the suit-type coats intended to be covered in these categories and would normally be placed in breakouts for "other coats," in textile categories 334, 434, 634, or 834.

Coats with suit-type features which have pile or quilted linings over substantial parts of their bodies would also be considered "other coats," and not suit-type coats. However, the presence of quilting over small areas, such as elbow patches, will not prevent a coat with suit-type features from being placed in the "suit-type" breakout categories 333/433/633/833.

Category:	Cotton	334
	Wool	434
	Man-made	634
	Other	834

Category designation: Other coats, men's and boys'.

Category:	Cotton	335
	Wool	435
	Man-made	635
	Other	835

Category designation: Other coats, women's and girls'.

Three-quarter length or longer garments commonly known as coats, and other garments such as ski jackets, parkas and waist length jackets fall within this category. Men's and boys' suit-type jackets are not included. However, women's and girls' suit-type jackets and blazers are included; their outer shells consist of 3 or more panels (of which 2 are at the front) sewn together lengthwise. A coat is an outerwear

garment which covers either the upper part of the body or both the upper and lower parts of the body. It is normally worn over another garment, the presence of which is sufficient for the wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both. Garments in this category have a full or partial front opening, with or without a means of closure. Coats have sleeves of any length.

Within these categories there are various subdivisions:

(A) *Raincoats* are garments primarily designed for protection against rain other than those which qualify as "water resistant" described below. The water repellency which makes coats suitable as rainwear may be the result of the use of rubber or plastic material or may be the result of treating the fabric with a water repellent substance; the latter method is usual.

(B) *Water resistant coats* must meet the water resistance standard set out in Additional U.S. Note 2, Chapter 62, HTSUSA. Coats which are of fabrics that are visibly coated are provided for elsewhere.

(C) *Shirt-jackets* have full or partial front openings and sleeves, and at the least cover the upper body from the neck area to the waist. They may be within the coat category if designed to be worn over another garment (other than underwear). The following criteria may be used in determining whether a shirt-jacket is designed for use over another garment, the presence of which is sufficient for its wearer to be considered modestly and conventionally dressed for appearance in public, either indoors or outdoors or both:

(1) Fabric weight equal to or exceeding 10 ounces per square yard (note (D) below re: CPO style shirts).
(2) A full or partial lining.
(3) Pockets at or below the waist.
(4) Back vents or pleats. Also side vents in combination with back seams.
(5) Eisenhower styling.
(6) A belt or simulated belt or elasticized waist on hip length or longer shirt-jackets.
(7) Large jacket/coat style buttons, toggles or snaps, a heavy-duty zipper or other heavy-duty closure, or buttons fastened with reinforcing thread for heavy-duty use.
(8) Lapels.
(9) Long sleeves without cuffs.
(10) Elasticized or rib-knit cuffs.
(11) Drawstring, elastic or rib-knit waistband.

Note: On knit garments, items 10 and 11 count as one feature.

Garments having features of both jackets and shirts will be categorized as coats if they possess at least three of the above listed features and if the result is not unreasonable. Many such garments will function as the upper part of leisure suits and will be placed in the categories for "suit-type coats." (See discussion of leisure suit jackets under categories 333/433/633/833). Garments not possessing at least 3 of the listed features will be considered on an individual basis.

(D) *CPO-type shirts* possess shirt-jacket styling and may be treated as either a shirt or a jacket depending on the fabric used. When lined they are considered jackets. When unlined and made from a fabric weighing 12 ounces per square yard or more, they are considered jackets; when weighing less than 12 ounces per square yard, they are considered shirts.

(E) Also in these categories are included knit garments which otherwise qualify as cardigan sweaters, but extend below the mid-thigh or have a quilted lining.

(F) *Cardigans with a sherpa lining,* or a heavy weight fiberfill lining, including quilted linings, used to provide extra warmth to the wearer are included.

(G) *Cardigans which are "tailored"* according to the definition in the Foreword are included.

(H) *Plastic or rubber coated:* Garments which have an outer surface covered with plastic or rubber which completely obscures the underlying fabric are excluded from these quota categories.

Category:	Cotton	336
	Wool	436
	Man-made	636
	Other	836

Category designation: Dresses (including uniforms).

Dresses are at the core of the highly imaginative feminine fashion field, in which the new and the different are the usual. A variety of names is used, including, among others, "gown," "frock," and "sheath." A dress is a one-piece garment for the female (except as noted in infants' wear) covering the top of the body and extending to somewhere from below the mid-thigh to the feet. It is appropriate for wear without other outer garments, and its lower end encloses both legs in a single "tube" (rather than in two, as trousers do). "Tennis dresses," by virtue of their short length are not included here. They are considered shirts or blouses.

Woven garments styled like shirts or blouses which extend below mid-thigh may be included in this category if they are designed and/or are intended for wear as dresses and provide the coverage dresses require.

Dresses with matching or coordinating jackets, vests, boleros, or similar components (sometimes called "two-piece dresses") are classified separately, the dress in this category, the other component elsewhere as appropriate.

This category also includes garments known as sundresses, informal party dresses, floats, etc., of various lengths frequently sold in loungewear departments. The garments are suitable for wear on social occasions in and outside the home and should not be confused with the robes and dressing gowns included in categories 350/459/650/850.

The phrase "including uniform dresses," which formerly appeared in the statistical positions for these items, has been deleted although the category designation is unchanged. The deletion does not result in the removal from these provisions of any items which were properly included therein, but avoids the possibility of including uniforms which are not, in fact, dresses. Uniform dresses, which are in this category, include one-piece items such as worn by nurses and waitresses. The "suit-type" of uniform, consisting of a jacket and skirt such as worn by airline stewardesses and policewomen, is not included.

Category:	Cotton	237
	Wool	459
	Man-made	237
	Other	859

Category designation: Playsuits, sunsuits, washsuits, creepers, rompers, etc.

This category provides for playsuits, sunsuits, washsuits, creepers, rompers, shortalls, and similar apparel for girls, sizes 2–14 and boys 2–7 and, in addition, provides for abbreviated garments, joined between the legs, for women, which are intended to be worn without other attire (outerwear).

Knit man-made fiber blanket sleepers for girls, sizes 2–14 and boys 2–7 are in category 651 and are discussed uner categories 351/459/651/851, pajamas and other nightwear. Coveralls and overalls for girls 2–14 and boys 2–7 are also provided for in this category except in the knit man-made fiber area where they are reported under category 659. (Adult male and adult female coveralls, overalls, jumpsuits, shortalls, skirtalls, and similar apparel are included in categories 359 and 659.)

In general, this category covers items of very informal dress for young children (girls 2–14 and boys 2–7) and is essentially a grouping of light-weight playwear garments, although heavier fabrics are also used. Specifically excluded are wearing apparel items primarily intended to protect the wearer from the elements such as snow suits, ski garments, ski overalls, etc. Also excluded from this provision are trouser-type garments which have no fabric bib to cover the upper part of the body. The garments without bibs are reported as trousers even though they may have suspender straps. It should be noted that the bib fronts on the garments within this category provision must be permanently stitched in place and significantly extend up from the waist. Tack stitching and snap-on, zip-on, and button-on methods of attachment are not considered sufficient to create a permanent bib front. In addition, bib backs by themselves on trousers would not be significant to include such garments in this provision.

Adult garments consisting of a separate top and bottom component are not included in this category and are separately classified in other categories. Two-piece physically connected entireties for girls 2–14 and boys 2–7, such as shirts and shorts having matching buttons and buttonholes, or shoulder loops with suspender straps designed to join the two pieces, which are so manufactured that the use of one without the other is not practicable, are encompassed within this category. However, button/buttonhole sets with pants that can reasonably be worn without the shirt, are not within this provision and are reportable separately.

Previously, two-piece women's tennis dress sets and golf dress sets, consisting of an abbreviated dress-like upper garment and a pair of matching panties were includable as playsuits in these categories. However, under the HTSUSA, this category coverage has not been continued and the two pieces forming these sets are separately classifiable and are no longer included as playsuits in these categories.

Not included in these categories are body suits and tights which fall in categories 359/659.

(1) Body suits are constructed of finely knit fabric which usually includes lycra or spandex yarns. They cover the wearer's torso and may have elastic around the neck, arm and leg openings. They are designed to be form-fitting and they may be intended for use during exercise, dance or similar athletic activity. Body suits are one piece garments. Unitards are body suits with arm and leg coverings and are included as body suits. Body suits are frequently called leotards in the trade.

(2) Tights are form-fitting garments which cover the lower torso and legs. They may have stirrups at the feet. Short tights also cover the lower torso, but only extend to above the knees. Tights are constructed of finely knit fabric which includes Lycra spandex, or similar yarns. They have an elasticized waistband. They are intended for use during exercise, dance or similar athletic activity. They have a gusset in the crotch area and are unsuitable for wear outside the athletic area unless worn in conjunction with a garment which conceals the lower torso.

Category:	Cotton	338
	Wool	438
	Man-made	638
	Silk and other vegetable fibers	838

Category designation: Knit shirts, men's and boys'.

Category: Cotton 339
Wool..................... 438
Man-made................. 639
Silk and other vegetable
fibers 838

Category designation: Knit shirts and blouses, women's and girls'.

Garments included in this category are of the type which are normally worn against the body or over underwear for appearance in public. They possess the following attributes:

(1) a length reaching from the neck area to the vicinity of the waist but may extend as far down as the area of the mid-thigh (see "dresses") and may be alluded to commercially as blouses, sport or dress shirts, polo shirts, pullovers, shells, halters or tops, turtleneck shirts, sweatshirts, T-shirts, etc.

(2) they may have a collar treatment of any type, including a hood, or no collar.

(3) they may have full frontal or back openings, partial openings in front or back, mock openings or no openings (full openings generally require some means of closure for the sake of modesty).

(4) they may have sleeves of any length or no sleeves.

(5) the bottoms are usually hemmed; however, they may be finished otherwise to prevent ravelling.

(6) construction may be tailored, full-fashioned, etc.

(7) Stitch count:

(a) Included in this category are:

(1) Blouses and shirts of Headings 6105 and 6106, whether classifiable there or in Headings 6103, 6104 or 6112. These garments must have an average of 10 or more stitches per linear centimeter in *each* direction, counted on an area measuring at lest 10 centimeters by 10 centimeters.

(2) blouses and shirts which do not meet the requirements of Headings 6105 and 6106, either because of their stitch count or for other reasons, but which generally meet the requirements for this category (see Headings 6103, 6104, 6110, and 6112).

(b) Not included in this category are sweaters, whether known as pullovers, vests, or cardigans, which are constructed essentially with 9 or fewer stitches per 2 centimeters measured in the horizontal direction.

(8) In women's and girls wear, garments with oversized or excessively revealing arm or neck openings, which are precluded from wear alone because they do not conform to conventional modesty standards, are excluded from consideration as shirts or blouses and are considered tops.

Various names are given to garments placed in these categories and certain distinctions must be made for proper statistical reporting. Listed below are certain garments which are included in these categories:

(a) *Shirts* in Headings 6105 and 6106 do not include garments with pockets below the waist or with a ribbed waistband or other means of tightening at the bottom of the garment. Garments in Headings 6105 and 6106 must have a full opening or a partial opening starting at the neckline. Heading 6105 does not include sleeveless garments; however, garments in Heading 6106 may be sleeveless. Shirts of other Headings are not subject to the above limitations.

(b) *T-shirts.*—All men's and boys' white underwear-style T-shirts, of cotton, are includable in category 352, not in category 338.

Other T-shirts in Heading 6109, which are assigned Category 338/339/638/639/838, must be constructed of the underwear type and from lightweight, knit underwear-type fabric, not napped, nor of pile or terry fabric, with or without pockets, and with long or short close-fitting sleeves. The garments should have a close-fitting or lower neckline (round, square, boat-shaped or V-shaped) and may have decoration, other than lace, in the form of pictures, words, or letters,

obtained by printing, knitting, or other processes. The bottom of the garment is usually hemmed. A ribbed waistband, a drawstring, or other tightening at the waist is not allowed. Buttons or other fastenings, openings in the neckline, and collars, are not allowed.

(c) *Sweatshirts* are pullover style garments with long or short length sleeves, snug fitting waist (elastic, drawstring, etc.) and cuffs. Pockets are allowed. A wide variety of neck treatments is permissible from crew, boat, or V-neck to hood and turned-down collar. The body of the garment, as distinct from the cuffs, waistband, neck and/or collar must be of the familiar, close-knit, unpatterned material, significantly napped on the inside. (Sweatshirts with full frontal openings are treated as jackets.)

(d) *Tank tops* are sleeveless with oversized armholes, with or without a significant drop below the arm. The front and the back may have a round, V, U, scoop, boat, square or other shaped neck which must be below the nape of the neck. The body of the garment is supported by straps not over two inches in width reaching over the shoulder. The straps must be attached to the garment and not be easily detachable. Bottom hems may be straight or curved, side-vented, or of any other type normally found on a blouse or shirt, including blouson or drawstring waists or an elastic bottom. The following features would preclude a garment from consideration as a tank top:

(1) pockets, real or simulated, other than breast pockets;
(2) any belt treatment including simple loops;
(3) any type of front or back neck opening (zipper, button, or otherwise).

It should be borne in mind that a distinction must be made between men's tank tops and singlets (athletic-type undershirts). Tank tops are of a fine knit construction with wider capping on armholes and neckline than singlets, which are made of fine knit lightweight fabric of ribbed construction.

(e) *"Top"* refers to those garments which, except for one or two distinctions in construction, would have fit into any one of the above listed breakouts. For example, those garments which are commonly referred to as midriffs, tube tops, crop tops, or halter tops do not reach the waist, and are considered tops. (It should be noted that while most halter tops do not reach the waist, the name halter refers to the neck treatment only).

Those garments which cover the chest area only, but reach neither to the shoulders nor to the waist are also included as tops. However, bolero jackets, which are short jackets, usually worn with dresses, are not included as tops. They are considered jackets if they have a full front opening, sleeves of any length and cover the upper part of the body. Another example of a top would be a garment with a full-front or back opening which might otherwise qualify as a shirt or blouse, but does not have any means of closure. Further, a tube-type garment, which may or may not be waist length, having a straight top (with or without attached shoulder straps), and off-the-shoulder tops, does not, strictly speaking, have a "neck-area" as required by the "Shirt and Blouse" guidelines and would be included herein. Also included are tabards. These are sleeveless garments having fully open sides which are secured by ties or other means of closure at the sides.

Capes and ponchos, which are similar garments to tabards except that they have greater coverage because they extend beyond the mid-thigh area, are not included as tops. Garments worn on the upper part of the body over "other wearing apparel," for example, vests or sleeveless jackets, are also excluded from tops.

Category:	Cotton	340
	Wool	440
	Man-made	640
	Other	840

Category designation: Men's and boys' shirts, not knit.

These categories cover male outer garments which extend from the neck and shoulder areas to or below the waist. A shirt should have a full or partial front opening, which closes left side over right side. These garments are worn over underwear or the skin and are considered conventional attire indoors and outdoors without other garments over them; they suffice the wearer except where circumstances dictate that a further degree of formality is required or where weather conditions necessitate additional protection. Shirts must have sleeves.

At the present time, distinctions made between types of collars, the presence of shirttails, or color pattern are helpful, but not definitive, in characterizing shirts as dress, sport or work garments. As an example, all types may have collarbands and tails and be solid colored. It is possible, however, to determine characteristics which lend themselves to shirts designed for specific uses; these characteristics are listed below.

Dress Shirts

A nonknit dress shirt should have collar and sleeve sizes stated in inches in men's sizes and in years or months in boys' sizes. For men's sizes: The collar size should be specific (i.e., 15, not 15–15½) while the sleeve length can be a combination such as 32–33 or 34–35, consistent with trade practice. Short sleeve dress shirts will usually show a single collar size, perhaps with an explanatory phrase such as "half sleeve."

The term "With two or more colors in the warp and/or the filling" is applicable to garments containing fabrics, excluding pockets, collars, cuffs, plackets, and other insignificant components, with different color yarns in the warp and the filling, or which have different color yarns within the wrap or within the filling. For the purposes of this term, different shades of the same color are considered different colors, and white is considered a color. The color may be the fibers' natural color or may be the result of a bleaching or dyeing process. If the result of a dyeing process, the color may be added at any stage in the manufacture of the fabric, in the fiber, yarn, or, in the case of cross-dyeing, in the fabric stage.

Category:	Cotton	341
	Wool	440
	Man-made	641
	Other	840

Category designation: Blouses, shirts, and shirt-blouses nonknit, women's and girls'.

This category provides for nonknit blouses and shirts for women and girls. Blouses are outer garments usually extending from the neck or shoulders to the vicinity of the waistline. However, also included in the category are overblouses and similar garments which may extend to the mid-thigh area or below, and which are frequently slit up the leg. Blouses may have a collar treatment of any type or no collar. The closure may be positioned on the front, back, or side, or the garment may even be without closure as in a pullover. Also included in the category are shirts, the feminine counterpart of men's and boys' shirts, from which they may be distinguished by size, style and, usually, fastenings. However, those shirts having a partial front opening on the neckline which fastens or overlaps left over right are considered to be shirts for men or boys and excluded from this category. See Foreword for discussion of unisex.

Outerwear garments known as camisoles, bandeaus and similar garments which may be described as tops, are excluded from this category.

Ties and scarves imported and intended to be sold with blouses and shirts, not permanently attached, are classifiable regardless of width with the blouses or shirts in this category unless thre is a compelling reason for separate classification.

Category:	Cotton	342
	Wool	442
	Man-made	642
	Other	842

Category designation: Skirts, women's and girls'.

This category provides for skirts, including wrap skirts, and culottes for women and girls. Skirts are outer garments covering the body below the waistline, and extend from the waist to nearly any length, dependent upon the fashion of the day. These garments usually have side or rear closures but may occasionally have a front closure. The lower end of the skirt must enclose both legs in a single tube with no fabric surrounding either leg separately. Distinguished from skirts in this respect, but includable in these categories, are culottes which, while retaining the frontal appearance of a skirt with regard to silhouette and fullness, are constructed so that the garment is cut up the middle and each leg is individually surrounded by fabric. However, when worn, the leg separation is not apparent when viewed from the front. It should be noted that gaucho pants have a construction similar to culottes but without the fullness, and for category purposes are classifiable as pants.

Category:	Cotton	See below*
	Wool	443
	Man-made	643
	Other	843

Category designation: Suits, men's and boys'

Men's and boys' suits consist of:

(1) a suit coat or jacket and one pair of trousers, breeches, or shorts

(2) a suit coat or jacket, vest and one pair of trousers, breeches, or shorts

All components of the suit must be of identical fabric as to construction, style, color, and composition, and of corresponding or compatible size. The cost or jacket must be tailored and consist of 4 or more panels, two in front and two in back, exclusive of sleeves, sewn together lengthwise; it must have a full-frontal opening (zippers not allowed); sleeves of any length; and be designed for wear over a shirt but not over another coat, jacket, or blazer. It may be waist length, as in Eisenhower jacket, or extend below the waist to any point slightly below the mid-thigh. Vests and trousers of contrasting fabrics or colors are not included as parts of suits and should be reported as individual articles under appropriate HTSUSA numbers.

Ensembles such as athletic suits, athletic unforms, rain suits, ski suits, work uniforms, etc., are not included in this category and should not be reported as such even though the components are of identical fabric.

The term "suit" includes the following sets of garments, whether or not they fulfill all the above conditions:

morning dress, comprising a plain jacket (cutaway) with rounded tails hanging well down at the back, and striped trousers;

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*Where no specific breakout appears for "suits", the parts will be placed in the breakouts appropriate to each garment. "Suit-type jackets" is considered superior to "coats" and where there is no provision for "suit-type jackets," "coats" will apply.

evening dress (tailcoat), generally made of black fabric, the jacket of which is relatively short at the front, does not close, and has narrow skirts cut in at the hips and hanging down behind;

dinner jacket suits, in which the jacket is similar in style to an ordinary jacket (though perhaps revealing more of the shirt front), but has shiny silk or imitation silk lapels.

Category:	Cotton	See below*
	Wool	444
	Man-Made	644
	Other	844

Category designation: Suits, women's, and girls'

Women's and girls' suits feature some degree of tailoring and are designed for wear on business and social occasions when some degree of formality is required. The components are always bought and sold as a unit.

The term suit means a set of garments composed of two or three pieces made up in identical fabric and comprising:

one garment designed to cover the lower part of the body and consisting of trousers, breeches or shorts (other than swimwear), a skirt or a divided skirt, having neither braces nor bibs, and

one suit coat or jacket the outer shell of which, exclusive of sleeves, consists of four or more panels (two in front and two in back) sewn together lengthwise, designed to cover the upper part of the body. A tailored waistcoat may also be included.

All of the components of a suit must be of the same fabric construction, style, color and composition; they must also be of corresponding or compatible size. If several separate components to cover the lower part of the body are entered together (e.g., trousers and shorts, or a skirt or divided skirt and trousers), the constituent lower part shall be the trousers, or, in the case of women's or girls' suits, the skirt or divided skirt, the other garments being considered separately.

Ensembles such as athletic suits, athletic uniforms, rain suits, ski suits, snow suits, work uniforms, etc., are excluded from this category.

Category:	Cotton	345
	Wool	445/446
	Man-made	645/646
	Noncotton vegetable fiber	845
	Silk	846

Category designation: Sweaters and cardigans, knit

(1) Included in this category are garments commercially known as cardigans, sweaters, pullovers, sweater vests, etc. They cover the upper body from the neck or shoulders to the waist or below (as far as the mid-thigh area).

(2) Sweaters in this category may have a collar treatment of any type, including a hood, or no collar, and any type of neckline; they may be pullover style or have full or partial front or back opening; they may be sleeveless or have sleeves of any length and any type of pocket treatment. Sweaters may also have an attached scarf. Cardi-

*Where no specific breakout appears for "suits," the suit components will be placed in breakouts appropriate to each garment.

gans have a full-front opening. The presence of a turned down collar would not exclude a cardigan from the sweater designation.

Cardigans with a sherpa lining or a heavy weight fiberfill lining, including quilted linings, both of which are used to provide extra warmth to the wearer, are excluded from consideration in this category.

(3) Stitch count:

> All garments reaching from the neck area to the waist or as far as the mid-thigh, except tailored suit coats, car coats, sport coats, jackets, robes and dressing gowns, etc., having essentially 9 or fewer stitches per 2 centimeters measured in the horizontal direction and meeting the general description herein are considered sweaters.

Category: Cotton 347/348
Wool 447/448
Man-made 647/648
Other 847

Category designation: Trousers, breches and shorts, men's and boys', women's and girls'.

This category includes outerwear garments with leg separations extending to the vicinity of the upper thigh or below. They are held by various means, chiefly through waist or hip cinching mechanisms such as elasticized or ribbed waistbands, belts, or adjustable taps; but permanently affixed suspenders can also be used without the garment being excluded from this category. Excluded are trousers with permanently attached front bibs extending more than six inches, as measured from the lowest point of the rise, above the natural waistline, panties, bloomers, and culottes described in categories 342/442/642/842. Included are specialized versions of trousers and shorts such as riding breeches, jodhpurs, gaucho pants, knickers, jogging shorts, and trousers with back bibs of whatever height.

Trousers which continue above the natural waistline for a short distance including self-fabric strap extensions, are included. These garments are called "suspender pants" or are sometimes incorrectly termed "jumpsuits". If the fabric extension above the natural waistline extends beyond six inches as measured from the lowest point of the rise, the garments would not be included in this category.

Garments commercially known as jogging or athletic shorts are normally loose-fitting short pants usually extending from the waist to the upper thigh and usually have an elastic waistband. They may resemble swim trunks for men, boys, or male infants, which are not included in this category. Swim trunks will usually have an elasticized waist with a drawstring and a full lightweight support liner. Garments which cannot be recognized as swim trunks will be considered shorts.

Category: Cotton 349
Wool .... 459 ("other")
Man-made 649
Other 859

Category designation: Brassieres and other body-supporting garments.

This category covers the named items and others of kindred nature; it does not cover items such as prosthetic or orthopedic appliances or "bandage" type articles. It also does not cover articles mainly intended to support apparel, such as garter belts.

Articles named in the designation, imported in an unfinished condition, are included. Parts, such as garter pads, closures, and shoulder straps, are not includable in this category.

This category does not cover waist trimmers. Waist trimmers are not garments since they serve none of the functions traditionally associated with garments or clothing. They are classifiable under the provisions for articles not specially provided for.

This category also does not cover garments containing Lycra spandex, or similar elastic-type yarns, the primary purpose of which is to cause the garment to fit snugly under outer garments. These garments are not considered "body-supporting."

Category:	Cotton	350
	Wool	459 ("other")
	Man-made	650
	Other	850

Category designation: Robes and dressing gowns.

Dressing gowns, including bath robes, beach robes, lounging robes and similar apparel. Physical characteristics which are expected in garments included in this category include:

(1) Looseness.

(2) Length, reaching to the mid-thigh or below.

(3) Usually a full or partial front opening, with or without a means of closure.

(4) Sleeves are usually, but not necessarily, present.

Included as lounging robes and similar apparel are those garments worn in the home for comfort which are inappropriate for wear on social occasions in and outside the home.

Excluded are those worn as street attire or over outerwear for protection from soil or wear, such as smocks.

Smoking jackets and similar garments, while having a marginally similar appearance to items included in this category, are in fact substantially different in use. Smoking jackets and similar garments are tailored, traditionally from a woven fabric, frequently a satin or brocade. They are semiformal by nature and are, by contrast to the garments in this category, worn over outerwear, e.g., shirt and pants and, sometimes, tie. Such garments are excluded from this category and are considered as "other coats."

Category:	Cotton	351
	Wool	459 ("other")
	Man-made	651
	Other:	851

Category designation: Pajamas and other nightwear.

Pajamas are worn by both sexes and all ages. They consist of an upper part, pullover or coat style, with long, short, or no sleeves and a lower part, short, intermediate, or long trouser-like garments or of any style panties. The lower part sometimes encloses the feet. Pajamas are sleepwear. Garments called "sleepers" (sometimes called Dr. Denton's), one-or two-piece knit sleeping garments for girls, sizes 2–4 and boys 2–7, buttoning in front or back and with drop seats in the one-piece style, are in this category.

The term "nightwear" is interpreted as meaning "sleepwear" so that certain garments worn in bed in the daytime, as by infants over 86 centimeters in height and the bed-ridden, are included. "Other nightwear" includes various articles worn for sleeping, such as nightgowns, night-shirts, "waltz gowns," etc., but does not include negligees, bed jackets, "sleep coats," or other apparel designed to be worn over sleepwear. The term "negligee" is loosely used commercially. To the extent that it refers to a garment worn over other nighwear, it is not in this category, and there may be instances in which sets described in total as negligees will have to be separated into the true nightwear items and other items.

Certain children's bed gowns (sometimes invoiced as "day gowns," or simply "gowns") are in this category. They are designed for wear by a child in bed and may be quite ornamental. They are loose and "boxy"-shaped, usually reach from the neck or shoulders to the ankles and have full length front closures.

Blanket sleepers for girls and boys, size 2 and over, are in these categories. Blanket sleepers are knit, footed, sleeping garments. They are usually made of brushed or napped man-made fabric and they cover the upper and lower part of the body. The item usually has wrist length sleeves, rib knit cuffs and a full front zipper closure that extends from the neckline to slightly above the ankle.

Category:	Cotton	352
	Wool	459 ("other")
	Man-made	652
	Other	852

Category designation: Underwear.

The term "underwear" refers to garments which are ordinarily worn under othe garments and are not exposed to view when the wearer is conventionally dressed for appearance in public, indoors or out-of-doors. Whether or not a garment is worn next to the body of the wearer is not a determinant; babies' diapers, for example, are so worn, as are bathing suits. Neither of these garments are customarily worn under other garments, and they are not underwear.

It should be noted that in distinguishing underwear, it is generally agreed that sleeveless tops with lace inserts or lace edgings are predominantly worn as underwear.

Body supporting garments, although having the characteristics indicated above for underwear, are excluded from the underwear provisions. They are includable in categories 349/459/649/859.

Men's and boys' all-white underwear T-shirts, of cotton, provided for in Heading 6109, are included herein. However, the traditional Chinese, white, knit, men's shirt with round neck, half-placket, and short sleeves is classified as a shirt in Heading 6105 and placed in Category 338.

Singlets (athletic-type undershirts), which are included in this category, are sleeveless, all-white undergarments constructed of a lightweight, fine ribbed-knit material.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 24

PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO CHARGES FOR RETURNED CHECKS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule, solicitation of comments.

SUMMARY: This document sets forth a proposed amendment to the Customs Regulations which will authorize a $100 charge for any check returned unpaid which was presented for payment of duties on noncommercial importations for which formal entry is not required or other Customs transactions not backed by a Customs bond. Currently there is no charge to cover the considerable extra expenditures in time and resources which the Customs Service incurs in connection with returned checks and attempted collection.

DATE: Comments must be received on or before February 6, 1989.

ADDRESS: Comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John V. Accetturo, Chief, Billings & Collections, National Finance Center, U.S. Customs Service (317-298-1307).

SUPPLEMENTARY INFORMATION:

Background

Each year the Customs National Finance Center (NFC) receives over 4,000 returned checks drawn by importers, brokers and persons returning from travel abroad. Establishing accountability for the associated debit vouchers and collecting the returned checks is an administrative process requiring significant time and effort that must be devoted to processing and handling by both the NFC and field officials. Although the NFC is primarily involved in establishing and monitoring control over the accountability and collection of

the returned checks, there are substantial operational costs incurred at the NFC and at the district/port level where Customs officers must establish liquidated damages, research entry documentation and provide copies of files to the NFC for collection action. These special actions, which are necessary only because of returned checks, disrupt and impede the Customs commercial operations mission. Accordingly, Customs proposes to impose a $100 charge for each returned check presented for payment of duties or other charges on noncommercial importations for which a formal entry is not required or other transactions not backed by a Customs bond. This charge reflects the actual cost to Customs of processing the returned check.

Comments

Before adopting this proposal, consideration will be given to any written comments (preferably in triplicate) that are submitted timely to the Customs Service. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Regulations (31 CFR 1.4) and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. to 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, Customs Headquarters, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the regulation will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory impact analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was James C. Hill, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 24

Accounting, Claims, Customs duties and inspection, Taxes, Wages.

Proposed Amendment

It is proposed to amend Part 24, Customs Regulations (19 CFR Part 24) as set forth below.

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The general authority citation for Part 24, Customs Regulations (19 CFR Part 24) and the specific authority for § 24.1, therein (19 CFR 24.1) would continue to read as follows:

Authority: 19 U.S.C. 66, 1202, 1624, 31 U.S.C. 9701; Pub. L. 99–272, Pub. L. 99–509. Pub. L. 99–662. § 24.1 also issued under 19 U.S.C. 197, 198, 1648.

2. It is proposed to amend § 24.1 by adding a new paragraph (e) to read as follows:

§ 24.1 Collection of Customs duties, taxes, and other charges.

* * * * * * *

(e) Any person who pays by check any duties, taxes, fees or other charges or obligation due the Customs Service which is not guaranteed by a Customs bond shall be assessed a charge of $100 for each check which is returned unpaid by a financial institution for any reason. This charge shall be in addition to any unpaid duties, taxes and other charges.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: October 21, 1988.
SALVATORE R. MARTOCHE,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 6, 1988 (53 FR 49207)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Edward D. Re

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Decisions of the United States Court of International Trade

(Slip Op. 88-149)

GRACE SMITH ET AL., PLAINTIFFS *v.* WILLIAM EMERSON BROCK III, SECRETARY OF LABOR OF THE UNITED STATES OF AMERICA, DEFENDANT

Court No. 85-06-00745

MEMORANDUM & ORDER

[Plaintiffs' motion for judgment on agency record granted, in part; remanded to the defendant.]

(Decided October 28, 1988)

D. Bruce Shine and *Shelburne Ferguson, Jr.* for the plaintiffs.

John R. Bolton, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendant.

AQUILINO, *Judge:* Defendant's decision(s) not to certify a group of workers as eligible to apply for adjustment assistance[1] under the Trade Act of 1974, 19 U.S.C. ch. 12, part 2, has led the group to commence this action and to move for judgment upon the agency record pursuant to CIT Rule 56.1.

I

The record contains a Petition for Trade Adjustment Assistance on behalf of employees at the Volunteer Plant of the Burlington Industries, Inc. Klopman Textured Woven Division in Bristol, Tennessee and another petition for such assistance for workers at that company's plant in Mountain City, Tennessee. The petitions characterized the plants' product as woven polyester fabric for use in wearing apparel. Both alleged, among other things, that:

> Half a million people in textiles and apparel have lost their jobs as a direct result of imports.
>
> Already, imports control one-third of the U.S. apparel market.

[1] *See Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance, Burlington Industries, et al.,* 49 Fed. Reg. 49,733 (Dec. 21, 1984), and *Burlington Industries; Negative Determination Regarding Application for Reconsideration,* 50 Fed. Reg. 15,002 (April 16, 1985).

> In 1983 alone, foreign textile and apparel imports into the U.S. rose 25 percent and 140,000 jobs were lost. And in the first 3 months of 1984, imports were up almost 50 percent over the same period a year ago.[2]

And the petitions projected separations at the two plants of some 500 employees, many of whom are now plaintiffs herein.

In the face of such allegations, the Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor[3] instituted investigations pursuant to 19 U.S.C. § 2271(a) to determine whether the workers were eligible to apply for assistance. *See* PubFile, pp. 13, 17; 49 Fed. Reg. 32,919 (Aug. 17, 1984). The statute stated at the time:

> **§ 2272. Group eligibility requirements**
>
> The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.
>
> For purposes of paragraph (3), the term "contributed importantly" means a cause which is important, but not necessarily more important than any other cause.

The findings of the investigation(s) are reported at pages 40–63 of the record. After review thereof, the Department decided that the criterion of paragraph (3) for relief had not been met upon the stated rationale that Labor had

> conducted a survey of the major customers that purchase polyester woven fabrics from Burlington Industries. This survey revealed that none of the customers surveyed increased their reliance on imported polyester woven fabrics in the January-July 1984 period compared to the same period in 1983. PubFile, p. 107.

The Department therefore denied eligibility.

The implication of this decision is that paragraphs (1) and (2) of section 2272 were met in the proceeding, a proposition which has support in the record. For example, it states that the Bristol plant had been in business over 30 years and would close permanently,

[2] Public File ("PubFile"), pp. 3, 18.

[3] Referred to hereinafter collectively either as "Department" or "Labor".

while the Mountain City plant would phase out approximately 100 jobs, mostly in the weaving department. *See* PubFile, p. 57. Approximately 400 workers would be affected. *See id.* at 101. As for sales of the Klopman Division, encompassing the two plants in question, data in the record reveal a decline from January-August 1983 to the comparable period in 1984,[4] while production at the Mountain City plant (but not Bristol) also dropped during the same time frame. *Compare* ConFile at 58 *with id.* at 59. *See also* Defendant's Memorandum, pp. 2–3, 7.

In any event, the petitioners requested reconsideration. The Department then ruled that there had been no error or misinterpretation of the law which would justify a reversal of its position, stating, for the most part:

> The investigative case file shows that * * * production lost at the Bristol and Mountain City plants would be consolidated at other company plants. Findings also show increased production of polyester woven fabrics at the Bristol and Mountain City plants and increased company sales in 1983 compared to 1982. These data do not support the * * * argument that increased imports in 1983 adversely affected * * * sales and production. Neither loss of potential sales nor the profitability of the product provide a basis for certification.
>
> The application for reconsideration cites increased imports of fabric and apparel as the reason for a weakening fabric market and for Burlington's actions at the Bristol and Mountain City plants. Finished articles such as apparel cannot be considered like or directly competitive with component materials such as polyester woven fabric within the meaning of the Trade Act. U.S. imports of polyester woven fabric decreased, in quantity, in the first nine months of 1984 compared to the same period in 1983.
>
> The Department's survey of Burlington's customers showed that none of the respondents, which represented a significant portion of the Textured Woven Division's sales decline in the first seven months of 1984 compared to the same period in 1983, increased their reliance on imported polyester woven fabrics for the same period. Only data for the first seven months of 1984 were used in the Department's survey since production at both plants and corporate sales of polyester woven fabrics increased in 1983 compared to 1982. Several respondents to the survey reported reduced purchases from Burlington because new fashion styling is toward blends of polyester and wool and polyester and cotton. The Bristol and Mountain City plants produced 100 percent polyester woven fabric.

PubFile, pp. 111–12.

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[4] *See* confidential record ("ConFile"), p. 58.

After denial of the request for reconsideration, this action was commenced, challenging the Department's decision(s) as defective and without basis and therefore not sustainable as supported by substantial evidence. The complaint prays that the negative determination be set aside or, alternatively, that the matter be remanded to the defendant to supplement and correct deficiencies in the record.

II

Plaintiffs' motion is presented with understandable fervor. It raises issues, however, that transcend the scope and standard of judicial review prescribed by Congress in 19 U.S.C. § 2395 and 28 U.S.C. § 2640(c) and (d). This law states that the findings of Labor, "if supported by substantial evidence, shall be conclusive". 19 U.S.C. § 2395(b).

A

Of the questions posed which are within the statutory framework of this court's competence, several focus on the survey the Department sought to conduct of Burlington customers. To begin with, the record reflects Labor selection for review of 15 accounts, which apparently amounted to 35 percent of the company's total sales for the periods January-July 1983 and 1984 and to 100 percent of the decline in sales, comparing the later period with the prior one. However, only seven of the 15 firms selected made any response to the Department's questionnaires, and Labor's reliance on the responses received has resulted in plaintiffs' now claiming that the reliance was fundamentally flawed and also challenging the agency's failure to exercise its subpoena power to compel answers from the eight silent accounts.

The use of partial surveys to determine the effect of imports on worker separation has been held to be sufficient. For example, in *Local 167, Int'l Molders and Allied Workers' Union, AFL-CIO* v. *Marshall*, 643 F.2d 26 (1st Cir. 1981), the petitioners took exception to Labor's survey of purchases during the year of separation and the preceding year which comprised 49 percent and 68 percent of the closing foundry's total sales during the respective two years. In affirming Labor's use of such a survey, the court of appeals referred to information that the Department "normally attempts to survey several customers of different sizes and geographic locations, accounting for 25–30 percent of the subject firm's sales." 643 F.2d at 31.

This may be normal, as the 35-percent-of-sales starting point indicates herein, but in *Local 167* and in other recent cases the sales actually reviewed by the Department have reflected much higher percentages of the total pictures. *E.g., Estate of Finkel* v. *Donovan*, CIT 374, 614 F.Supp. 1245 (1985) (60 percent); *Holloway* v. *Donovan*, 7 CIT 237, 585 F.Supp. 1427 (1984) (85 percent); *Cherlin* v. *Donovan*, 7

CIT 158, 585 F.Supp. 644 (1984) (62 percent). This is no doubt as it ought to be, for, as the court of appeals stated in *Local 167*, "the Secretary is obliged to conduct his investigation with the utmost regard for the interest of the petitioning workers." 643 F.2d at 31.

In *Stipe* v. *U.S. Department of Labor*, 9 CIT 543 (1985), customers accounting for 94.9 and 82.4 percent of the lost sales were surveyed. In the action at bar, the agency attempted to cover all the lost sales, but less than half of the customers gave any response and, at best, their decreased purchases were only equal to some 30 percent of the total loss.[5] Furthermore, the record lacks information from the two firms with the greatest declines in purchases for the period in question. *Compare* ConFile at 36–39 *with id.* at 64–81.

The plaintiffs argue that the larger of those two customers accounted for almost four times more purchases than did the responding firm with the most purchases of those complying.[6] They also justifiably contend that the absence of information from such customers is ground for remand and reconsideration. In *Donna Kelley* v. *Secretary, U.S. Department of Labor*, 9 CIT 646, 650, 626 F.Supp. 398, 401 (1985), the court held that the

> failure to consider data from the company that accounted for the largest decline in orders during [a review] period or to explain the absence of this data from the record determines that the methodology was not in accordance with law and, as such, cannot support a conclusion that the Secretary of Labor's determination is supported by substantial evidence.

In a subsequent opinion in the same case, the court stated that it did not

> propose to establish a specific level of sales or of a sales decline that must be accounted for in the record. The samplings in the record are so small, however, that they simply cannot provide sufficient support for the Secretary's denial of eligibility to apply for trade adjustment assistance, in the context of the information provided thus far.[7]

The court concluded that remand to the Department for further consideration was appropriate in view of such a shortcoming in the record. This court concurs, insofar as this action is concerned.[8]

B

The plaintiffs also challenge the Department's focusing only on the two January-July periods in reaching its decision. They plead

---

[5] *Compare, e.g.*, PubFile at 62 *with* ConFile at 113. Inspection of the record reveals the absence of complete answers on the part of some customers and also the use of "N/A", without indication as to whether that shorthand reference signifies "not applicable" or "not available". If the latter, the low overall response could be even less conclusive.

[6] To look at it another way, the seven respondents' 1984 aggregate value of sales barely exceeded that of the largest customer. *Cf.* ConFile, pp. 36–39.

[7] 10 CIT 250, 252, 633 F.Supp. 1374, 1376 (1986). While the court's judgment was subsequently vacated on appeal, 812 F.2d 1378 (Fed.Cir. 1987), the ground for that result was procedural, not the point relied on herein.

[8] Of course, on remand Labor may, in the exercise of its sound discretion, rely on its subpoena power under 19 U.S.C. § 2321 in obtaining sufficient information to meet the solemn obligations imposed by the Trade Act of 1974.

for reliance on annual and cumulative data for the industry when surveying its economic and market status. *See, e.g.*, Plaintiffs' Memorandum, p. 3.

The agency, of course, had discretion to do as the plaintiffs pray, but it was not required to do so. For example, in *Paden* v. *U.S. Department of Labor*, 562 F.2d 470 (7th Cir. 1977), the petitioners took issue with Labor's comparison of data for the year immediately prior to the worker separation with data for the year of that occurrence. They argued that Labor "is obligated to compare years prior to the year immediately preceding the year of separation with the actual year of separation in determining whether there has been an increase in imports." 562 F.2d at 472. They had also apparently requested the Department to compare the preceding years with years other than the one of separation. *See id.* at 472–73. The court of appeals reviewed section 2272(3), its legislative history, and previous determinations of Labor and upheld the agency's choice of review periods as a valid exercise of its discretion. Specifically, the Seventh Circuit stated that, by

> confining consideration to imports during the year of separation and the immediately preceding year, the Secretary can focus on those imports which are most likely to affect employment in the year of separation while diminishing consideration of those factors which, while affecting employment, are not within coverage of the act. Although petitioners' contention that imports in any given year may adversely affect employment several years later is not without validity and is indeed recognized as a distinct possibility by the Secretary, we are not convinced that the Secretary's practice should be condemned either generally or under the circumstances of this particular case. 562 F.2d at 473–74.

The same can be said for the Department's comparison of the periods at issue herein. *See, e.g., Former Employees of Homestake Mining Company* v. *Brock*, 12 CIT ——, ——, Slip Op. 88-41, at 7 (March 28, 1988); *Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 834* v. *Donovan*, 8 CIT 13, 18, 592 F.Supp. 673, 677 (1984).

The August petitions filed in this matter led Labor to consider the first-half segments of 1984 and 1983 for the purpose of comparing those questionnaire responses received from Burlington's customers. That approach can hardly be gainsaid in view of record evidence showing that "production at both plants increased in 1983 compared to 1982, and corporate sales of polyester woven fabrics increased in 1983 compared to 1982". PubFile, p. 63.

C

The plaintiffs press the proposition that imported, finished apparel made out of blends with cotton or wool were "directly competitive" with the Burlington polyester woven fabric at issue and also that that apparel is "substantially equivalent for commercial pur-

poses" to the product from Bristol and Mountain City. The language quoted has been drawn by them from H.R. Rep. No. 1435, 91st Cong., 2d Sess. 25 (1970) in regard to the Trade Expansion Act of 1962, a predecessor of the Trade Act of 1974. Indeed, the later enactment (quoted above, section 2272(3)) requires the Secretary to consider "increases of imports of articles like or directly competitive with articles produced by [petitioning] workers' firm". The plaintiffs eschew any desire to rely on the statutory element "like" in pressing their point[9]—in the light of *Gropper* v. *Donovan,* 6 CIT 103, 569 F.Supp. 883 (1983).

In that case, as here, the petitioning workers asserted that an increase in the importation of finished garments had a negative effect upon domestic production of finished fabric for domestically-manufactured clothing. An issue before the court was whether the imported merchandise was "like or directly competitive" with the product of the plaintiff. The court, in its thorough opinion relying on *United Shoe Workers of America, AFL-CIO* v. *Bedell,* 506 F.2d 174 (D.C.Cir. 1974); *Machine Printers & Engravers Ass'n of United States* v. *Marshall,* 595 F.2d 860 (D.C.Cir. 1973), and *Morristown Magnavox Former Employees* v. *Marshall,* 671 F.2d 194 (6th Cir.), *cert. denied sub nom. Kyle* v. *Donovan,* 459 U.S. 1041 (1982), answered in the negative, as follows:

> * * * [T]he finished fabric in the present case is a *component* of a finished article, knit fabric garments, that has been adversely impacted by increased imports. Hence, the finished fabric is not embraced by the phrase "like or directly competitive" in section 222(3), since it is neither interchangeable with, nor substitutable for the import-impacted knit fabric garment.[10]

On its face, this conclusion is not hinged solely on "like", and counsel's careful attempt to focus on "directly competitive" is of little avail in this analogous action. But even if the ambit of the concept were broader, there is little in the record as it stands to support a finding either of directness on the part of the competition or of its substantial equivalency for commercial purposes. Apparently, the latter concept, in the eyes of Congress, encompasses articles that are adapted to the same uses and are essentially interchangeable. *See, e.g.,* H.R. Rep. No. 1435, 91st Cong., 2d Sess. 25 (1970).

D

As indicated above, plaintiffs' motion is based on claims which fall beyond the boundaries of judicial resolution. For example, it is contended that the Secretary of Labor "evidenced a lack of comprehensive knowledge of the textile/apparel industry, to-wit, the interrelation and interdependency of the two processes"[11] and that he "failed to understand economic conditions during the time in ques-

[9] *See generally* Plaintiffs' Third Memorandum.
[10] 6 CIT at 109, 569 F.Supp. at 887 (emphasis in original).
[11] Plaintiffs' Memorandum, p. 6.

tion." Plaintiffs' Memorandum, p. 6. Such averments are set forth herein only to indicate that the court has carefully considered all of them and has concluded that only the one discussed in Point IIA above entitles the plaintiffs to any relief in this action.

That relief entails, at the moment, grant of plaintiffs' motion on that point on the record, as it stands, and remand of the matter to the defendant for further proceedings not inconsistent with this memorandum.

The defendant shall file within 45 days hereof the results of any further proceedings. The plaintiffs may have 15 days thereafter in which to respond, and the defendant may have ten days to reply thereto.

So ORDERED.

(Slip Op. 88–150)

THE WEST BEND CO., DIVISION OF DART INDUSTRIES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 81–07–00844

Before WATSON, *Judge.*

[Judgment for plaintiff.]

(Decided October 28, 1988)

An imported popcorn popper is found to have an important electro-mechanical component, consisting of a fan and motor, the presence and function of which makes the tariff classification under Item 684.20 of the Tariff Schedules of the United States, based solely on its electro-thermic heating component, inadequate and incorrect. The proper classification is held to be as an electrical article, not specially provided for under Item 688.42 of the TSUS.

Barnes, Richardson & Colburn (Andrew P. Vance and *Sandra Liss Friedman* of counsel) for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Barbara M. Epstein,* Commercial Litigation Branch) for defendant.

MEMORANDUM OPINION

WATSON, *Judge:* This action raises the issue of the correct classification of an electric hot-air corn popper known as the "West Bend Poppery Model No. 5459" and imported between April, 1980 and January, 1981.

The merchandise was classified as a portable electro-thermic appliance under Item 684.20 of the Tariff Schedules of the United States ("TSUS") which, under a general heading listing various articles which use electricity to produce heat, specifically provides for "toasters, waffle irons, skillets, ovens, stoves, coffee makers and oth-

er portable electro-thermic kitchen and household appliances" to be dutiable at a rate of 8.1% ad valorem.

Plaintiff's first claim was for classification under a general heading providing for other electro-*mechanical* household appliances, specifically as "other" such articles, classifiable under Item 683.32 of the TSUS and dutiable at a rate of 5.8% ad valorem. Plaintiff made an alternative claim for classification as other electric articles not specially provided for under Item 688.42, dutiable at the rate of 5.2% ad valorem. Plaintiff also moved at trial to amend its pleadings to assert another alternative claim for classification under the same general heading as the classification assigned by the government, but under a provision for articles of the type named in the general heading "other" than those provided for in the disputed Item 684.20. The last alternative claim is for classification under Item 684.50, with duty payable at the rate of 5.3% ad valorem. The Court hereby grants that motion in the interest of providing a full and fair opportunity for plaintiff to present its alternative claims.

The essence of this dispute revolves around the fact that, in addition to the indisputable presence of an electro-thermic component, the imported article also has an electro-mechanical component consisting of an electric motor and fan. The question for the Court is to what extent, if any, the presence and importance of the electric motor and fan detracts from the government's classification of this article as an electro-thermic kitchen appliance and requires another classification.

The imported device, exclusive of its clear plastic top, has the appearance of a tapered cylinder approximately one foot high, with an electric power cord entering at the bottom. Under a recess at the front, near the bottom, a number of openings allow air ro enter the interior and a switch for turning the device on or off is located nearby. At the top of the cylinder, one looks down into a circular well which descends for about half the height of the cylinder, ending in a metal cup at the bottom, which cup has slits or vanes all around its walls at regular intervals. If one then examines a cutaway of the cylinder one can see that the aforementioned cup is the popping chamber and is surrounded by a heating element consisting of a ceramic form, shaped like an ashtray, wrapped in a metal spring. The spring's resistance to electricity generates heat in that element of approximately one thousand degrees. Under the heating element is a mechanical thermostat which shuts off the article if the temperature at that location reaches 275 degrees. A fan driven by a motor is located underneath, in the nethermost position of the cylinder. In operation, the fan draws in air from the outside and the air is heated by the heating element. The heated air enters the popping chamber through the slits or vanes, imparting to the corn kernels a circular motion which subjects them to heat in an even manner and eventually raises their temperature to the popping point. As the corn begins to pop, it rises in the well and, by virtue of both its own

expansion and the flow of air, it is conveyed out through the top and down the chute which exits the top. The wise user has an appropriate receptacle waiting for this important American contribution to world cuisine. The emptying process continues until the well is empty or virtually empty except for those few kernels which seem to be impervious to heat.

In functional terms it can fairly be said that this device contains an electro-thermic element which is essential to the popping of the corn and an electro-mechanical element which is also essential to the process. In the opinion of the Court, the evidence of record and the principles developed in case law in this area indicate that this importation is not adequately or accurately described as an "electro-thermic appliance." First of all, it must be noted that the provision for electro-thermic appliances is not a description by name. Therefore, the basic principle that tariff acts were enacted to include all forms of *named* articles does not apply here. That line of case law is represented by *Clairol, Inc.* v. *United States*, 7 CIT 377 (1984) in which the Court held that electric tweezers were properly classifiable as tweezers.

Classification as an electro-thermic appliance is, in essence, classification by reference to the predominant operating principle of the importation. In the opinion of the Court, the weight of the evidence at trial and the reasoning of the most relevant case law lead to the conclusion that this a hybrid object which cannot properly be classified either under an electro-thermic classification or under an electro-mechanical classification.

The Court is satisfied that the only way in which this article can pop corn in a truly useful and safe manner is by the combined operation of the electro-thermic heating component and the electro-mechanical fan component. The government argues that if the fan and thermostat were removed from the circuitry the importation could still do some popping of corn in the heated chamber, but, in the view of the Court, this would be a dangerous and entirely unsatisfactory use of the article. The electro-mechanical component is an integral and important part of the popping process.

The best demonstration of the important combined function of the two components was the testimony as to the normal operation of the device and the Court's confirmation of its normal operation by actual use of joint Exhibit A. A measure of corn kernels was deposited in the well of the device; the cover was put in place, and it was switched on. The kernels began a massed, swirling movement clearly visible from above. The movement continued for a few minutes until some of the kernels began to pop. As the popped corn rose in the cylinder, the swirling of the remaining unpopped kernels could still be heard. Within about four minutes the popped corn was beginning to flow out of the chute. Ultimately, all of the popped corn was blown out and only a few unpopped kernels remained careening around the interior under the influence of the blowing

air. This demonstration, as well as the detailed testimony at trial, demonstrated that in the normal operation of this article, the fan component draws in air from the outside, causes the heated air to move through the chamber with sufficient force to swirl the kernels around, distribute the heat evenly, and then contributes to the rising of the popped corn and the eventual ejection of all the popped corn. The functional importance of the electro-*mechanical* component is such that it would be unreasonable to say that this is simply an electro-thermic appliance.

The Court is certain that it was not the intention of this provision for electro-thermic appliance to encompass all devices having electro-thermic components regardless of the significance of interrelated components. From the examples of electro-thermic kitchen and household appliances named in Item 684.20 the toaster is the only article which can be considered to routinely have a mechanical adjunct of some sort, namely, the mechanical element which either pops up the toast or conceivably opens the door at the conclusion of the toasting process. But that terminal function does not begin to approach the continuous involvement of the electro-mechanical element in the function of the imported corn popper and the presence of the toaster exemplar cannot overcome the legal principles which govern this classification.

Thus, if we were to reason from the general examples given in the classified provision, we would have to say that they are predominantly electro-thermic in their function, and have no other significant operating components of other types, and are therefore unlike the corn poppers at issue. The cases which are most directly on point are *Robert Bosch Corp.* v. *United States*, 63 Cust. Ct. 96, C.D. 3881 (1969) and *Harper Wyman Co.* v. *United States*, 1 CIT 108 (1981). In the former case the Court held that an imported article which performed a mechanical function of engaging the starter of a car into gear with the fly wheel, in addition to an electrical function of causing the current to flow from the car battery to the car ignition system, was not adequately described as an electrical switch. The Court reasoned as follows:

> The principle is well-established that where an article is in character or function something other than as described by a specific statutory provision - either more limited or more diversified - and the difference is significant, it cannot find classification within such provision. It is said to be more than the article described in the statute. *Cragston Corporation* v. *United States*, 51 CCPA 27, C.A.D. 832 (1963); *United States* v. *The A.W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794 (1962); *Garrard Sales Corp.* v. *United States, supra*, and *Hirsch & Co. et al.* v. *United States*, 4 Ct. Cust. Appls. 82, T.D. 33365 (1913). By contrast where the difference is in the nature of improvement or amplification, and the essential character is preserved or only incidentally altered, the applicable rule is as expressed in *Noot-*

ka Packaging Co. et al. v. *United States*, 22 CCPA 464, T.D. 47464 (1935), that an unlimited *eo nomine* statutory designation includes all forms of the article in the absence of a contrary legislative intent or commercial designation.

* * * * * * *

We are of the opinion on the basis of the instant record that the starter solenoid switch here involved falls within the category of articles covered by the so-called "more than" rule. *Since it operates mechanically as well as electrically and both functions are significant in activating the starter motor*, it is more than an electrical switch or other electrical apparatus for making or breaking electrical circuits within the intendment of Item 685.90, TSUS. (63 Cust. Ct. at 103–104, emphasis supplied.)

In *Harper Wyman Co.* v. *United States*, the Court held that the imported combination of a mechanical switch and a thermostat, both of which would have been specially provided for as separate articles, had resulted in a new article which was not adequately described by either of the two provisions.

The plaintiff's claim for classification as an electro-*mechanical* appliance, is untenable for exactly the same reason that makes the government's classification incorrect. The imported article is more than an appliance which functions on electro-mechanical principles. The plaintiff's alternative claim for classification under Item 684.50, another subcategory of electro-thermic appliances, is out of the question. Whatever may be the characteristics of articles falling under that residual provision, they must still be electro-thermic in essence, without conflicting, additional essential components.

The evidence of record and the case law establish that this popcorn popper cannot be adequately described either as an electrothermic appliance or as an electro-mechanical appliance. As a result, the only accurate and fully satisfactory classification for this article is as an electrical article not specially provided for under Item 684.20 of the TSUS. Judgement will enter accordingly.

(Slip Op. 88–151)

THE BUDD CO. WHEEL AND BRAKE DIVISION, PLAINTIFF *v.* UNITED STATES, DEFENDANT AND FNV-VEICULOS E. EQUIPAMENTOS, S.A., DEFENDANT-INTERVENOR

Court No. 88–09–00725

Before CARMAN, *Judge.*

[Plaintiff's motion for preliminary injunction denied.]

(Decided October 31, 1988)

Barnes, Richardson & Colburn, (*James H. Lundquist, Matthew Clark* and *Peter A. Martin*) for the plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Platte B. Moring, III*); and Office of the Assistant General Counsel for Import Administration, U.S. Department of Commerce, (*Matthew Jaffe,* of counsel) for the defendant.

Willkie Farr & Gallagher, (*William H. Barringer, James P. Durling, Daniel L. Porter*) for the defendant-intervenor.

Opinion

CARMAN, *Judge:* This Court issued an order on September 28, 1988 vacating the temporary restraining order and denying plaintiff's motion for a preliminary injunction. This opinion follows the issuance of that order.

Plaintiff, The Budd Company, filed motions and an affidavit pursuant to Rules 7(f), 65(a) and (b) of the Rules of this Court to obtain a temporary restraining order and a preliminary injunction restraining the International Trade Administration, United States Department of Commerce, (ITA or Commerce), and the United States Customs Service, (Customs), from liquidating entries of tubeless steel disc wheels imported from Brazil and manufactured by defendant-intervenor FNV-Veiculos E. Equipamentos, S.A. (FNV). A temporary restraining order was granted on September 22, 1988.

Background

On May 23, 1986 plaintiff filed an antidumping petition with the International Trade Commission, (ITC), and Commerce on behalf of the United States industry producing tubeless steel disc wheels. Commerce initiated on June 12, 1986 an antidumping duty investigation, 51 Fed. Reg. 21,952 (1986). The ITC determined on July 7, 1986, that there was a reasonable indication that an industry in the United States was materially injured or threatened with injury by imports of tubeless steel disc wheels from Brazil. 51 Fed. Reg. 25,752 (1986). At all relevant times the only two Brazilian exporters of tubeless steel disc wheels were Borlem, S.A. Empreedimentos, (Borlem), and FNV.

On December 19, 1986 Commerce issued its preliminary affirmative determination. 51 Fed. Reg. 46,904 (1986). Commerce directed Customs to suspend liquidation of Borlem's and FNV's entries and both companies were required to post a bond covering estimated antidumping duties.

Commerce issued its final affirmative antidumping duty determination on March 13, 1987. 52 Fed. Reg. 8,947 (1987). The ITC determined on April 27, 1987, that an industry in the United States was threatened with material injury by reason of imports from Brazil of tubeless steel disc wheels. 52 Fed. Reg. 17,487 (1987). On May 21, 1987, Commerce then issued an antidumping duty order concerning tubeless steel disc wheels from Brazil. 52 Fed. Reg. 19,903 (1987).

On that same day, Commerce also issued an amendment to its final determination, correcting a clerical error that occurred in the calculation of less than fair value margins for FNV. *Id.*

Borlem and FNV instituted an action in this Court challenging Commerce's final affirmative dumping duty determination in May, 1987. On June 15, 1988 this Court entered an order in *Borlem* remanding the action to Commerce with instructions to recalculate the antidumping duty margins and correct all clerical, methodological and transcription errors. *Borlem, S.A. Empreedimentos Industrias* v. *United States,* —— CIT ——, Slip Op. 88-77 (June 15, 1988).

On August 31, 1988, Commerce released a remand determination including new less than fair value margins which were *de minimis. Amended Final Determination of Sales at Less Than Fair value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels From Brazil* 53 Fed. Reg. 34,566 (1988). Based on this amended determination Commerce directed Customs to terminate suspension of liquidation for all entries of tubeless steel disc wheels from Brazil by FNV.

On September 22, 1988 plaintiff commenced this action challenging Commerce's amended determination and at the same time sought a temporary restraining order and a preliminary injunction to enjoin the liquidation of tubeless steel disc wheels exported from Brazil by FNV.

Discussion

A preliminary injunction is an extraordinary remedy that can be granted only upon a clear showing that the moving party is entitled to the relief requested. *American Air Parcel Forwarding Co.* v. *United States,* 1 CIT 293, 298, 515 F. Supp 47, 52 (1981).

In order to obtain a preliminary injunction the plaintiff must establish the following four factors: (1) the threat of immediate irreparable harm; (2) the likelihood of success on the merits; (3) that the public interest will be better served by issuance of a preliminary injunction; and (4) that the balance of hardship favors the plaintiff. *Zenith Radio Corp.* v. *United States,* 1 Fed. Cir. (T) 74, 76, 710 F.2d 806, 809; *Timken Co.* v. *United States,* —— CIT ——, ——, 666 F.Supp. 1558, 1559 (1987). A failure to establish any one of the requisite factors is fatal to the application for a preliminary injunction. *S.J. Stile Assoc. Ltd.* v. *Snyder,* 68 CCPA 27, 30, C.A.D. 1261, 646 F.2d 522, 525 (1981). The Court has applied the facts at hand to each factor and found that plaintiff has not met the standard necessary to be granted a preliminary injunction.

(1) *The Threat of Immediate Irreparable Harm*

The Court of Customs and Patent Appeals has interpreted this requirement as follows:

> Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before

> the merits are fully determined. A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.

68 CCPA at 30, 646 F.2d at 525.

Plaintiff contended that it would suffer immediate and irreparable harm if defendant-intervenor's entries were liquidated pending judicial review. Plaintiff urged should it prevail in its challenge to the final amended determination, without a preliminary injunction enjoining liquidation, the ultimate relief sought by plaintiff would be illusory since the FNV entries would already have been liquidated. Plaintiff, using the reasoning employed by the Court of Appeals for the Federal Circuit in *Zenith*, argued that liquidation of entries which were the subject of a Section 751 annual review determination constituted irreparable injury and should have like treatment in this case.

While *Zenith* held that liquidation constituted irreparable injury pending the final results of a Section 751 review, this Court has not given broad extension to that rationale in other proceedings. *See Timken*, —— CIT at ——, 666 F. Supp. at 1559–60; *Bomont Industries* v. *United States*, ——, CIT ——, ——, 638 F. Supp. 1334, 1338 (1986), *American Spring Wire*, 7 CIT at 6, 578 F. Supp. at 1408.

In *Timken*, plaintiff challenged a final determination by the ITA and refused to extend the reasoning of *Zenith* to allow the suspension of liquidation where there was an antidumping termination order.

> However, where the action contests either negative injury or negative dumping determinations in an investigation, not annual review results, recent cases have declined to hold that liquidation alone is sufficient to establish irreparable harm. [citations omitted] * * *.
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> * * * * * * *
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> * * * While plaintiff may not be satisfied that a successful challenge will result in only prospective relief, it retains both its statutory right and a remedy which may be pursued. Some further affirmative showing on plaintiff's part as to irreparable injury is required.

—— CIT at ——, 666 F.2d at 1559–60.

Following the rationale of *Timken*, *Bomont Industries* and *American Spring Wire*, plaintiff must prove irreparable injury by means other than liquidation alone. —— CIT at ——, 666 F. Supp. at 1559–60. Plaintiff contended during oral argument that it was unable to show any harm because of the suspension of liquidation which had been in effect. Since plaintiff offered no further evidence to show how it would be irreparably harmed, this Court denied plaintiff's motion for a preliminary injunction.

(2) *The Likelihood of Success on the Merits*

Plaintiff contended that it had raised "serious and substantial issues concerning the methodologies used by the ITA in its antidumping investigation." Plaintiff's Memorandum in Support of Plaintiff's Motions for Temporary Restraining Order and Preliminary Injunction, (Plaintiff's Memo), at 11. Plaintiff also contended that the requisite of showing the likelihood of success was satisfied because it had presented a "serious, substantial, difficult, and doubtful" question to the Court. *Id.*

While the Court found plaintiff's contentions interesting, there was not an adequate demonstration of proof to establish a likelihood of success on the merits to justify the issuance of a preliminary injunction.

(3) *The Public Interest Will be Better Served By Issuance of a Preliminary Injunction*

Plaintiff contended that it was in the public interest to keep the suspension of liquidation in place, maintaining, according to plaintiff, the *status quo.* Plaintiff's Memo at 13. Defendant and defendant-intervenor replied that the *status quo* would be better served if liquidation were to take place since Commerce had issued a final negative antidumping determination. Defendant's Memorandum in Opposition to Plaintiff's Motion For a Preliminary Injunction (Defendant's Memo) at 18; Defendant-Intervenor's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction (Defendant-Intervenor's Memo) at 17.

This Court has stated in the past that "there can be no doubt that [the public interest] is best served by ensuring that the ITA complies with the law, and interprets and applies our international trade statutes uniformly and fairly." *Ceramica Regiomontana* v. *United States,* 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984). In the instant case, based on a lack of adequate proof offered, the balance of equities tips in favor of the defendant. The public interest is best served by denial of the preliminary injunction.

(4) *The Balance of Hardship Favors the Plaintiff*

Plaintiff contended that the balance of hardship "falls squarely on plaintiff" because its right to have the entries complained of subjected to judicial scrutiny would be prejudiced if the injunction were not granted. Plaintiff's Memo at 14.

Defendant argued that granting plaintiff the injunction would establish a dangerous precedent especially if every petitioner in an antidumping investigation who was unsuccessful in the administrative proceedings could successfully obtain an injunction to preserve the possibility of obtaining the relief it initially sought at the administrative level. Defendant's Memo at 20.

FNV argued that suspension of liquidation imposed hardships on them because of the hindering effect suspension has on its business. FNV was also concerned that if the injunction were granted it could

take months before the litigation was completed and the injunction lifted. Defendant-Intervenor's Memo at 19–20.

The Court found that the balance of hardship favored defendant based upon the proof offered. Furthermore, should a plaintiff be able to obtain a preliminary injunction suspending liquidation, without other proof where there has been a negative determination in an antidumping investigation merely by starting an action in this Court challenging that negative determination, such relief would tend to unjustifiably disrupt the orderly administration of our trade statutes.

Conclusion

Plaintiff's application for a preliminary injunction is denied since it has failed to establish by requisite proof the necessary grounds for the issuance of a preliminary injunction. The preliminary injunction is denied.

(Slip Op. 88–152)

Mitsubishi Electric Corp., et al., plaintiffs *v.* United States, defendant and Motorola, Inc., defendant-intervenor

Consolidated Court Nos. 85–12–01858

[Remanded to ITC.]

(Dated October 31, 1988)

Baker & McKenzie, (*Thomas P. Ondeck* and *Thomas Peele*) for plaintiff Mitsubishi Electric Corporation.

Paul, Weiss, Rifkind, Wharton & Garrison, (*Robert E. Montgomery, Jr., Linda N. Valenstein,* and *George Kleinfeld*) for plaintiffs NEC Corporation and NEC America, Inc.

Wilmer, Cutler & Pickering, (*John D. Greenwald, Robert C. Cassidy, Jr.,* and *C. Loring Jetton, Jr.*) for plaintiff OKI Electric Industry Co., Ltd.

Weil, Gotshal & Manges, (*A. Paul Victor, Charles H. Bayar,* and *Jeffrey P. Bialos*) for plaintiffs Matsushita Communication Industrial Co., Ltd., Matsushita Communication Corporation of America, and Panasonic Industrial Co., Division of Matsushita Electric Corporation of America.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Sheila N. Ziff*); *Douglas A. Riggs,* General Counsel, *M. Jean Anderson,* Chief Counsel for International Trade Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce (*Eileen P. Shannon,* of counsel); and *Michael P. Mabile,* Assistant General Counsel, U.S. International Trade Commission, (*Judith M. Czako,* of counsel) for defendant.

Covington & Burling, (*Harvey M. Applebaum, Paul G. Gaston, Sonya D. Winner* and *David F. Hixson,* of counsel) for defendant-intervenor Motorola, Inc.

OPINION AND ORDER

CARMAN, *Judge:* This consolidated action concerns five separately filed actions before the Court: Mitsubishi Electric Corp. v. United States, Court Nos. 85-12-01858 and 86-01-00113; NEC Corporation and NEC America, Inc. v. United States, Court No. 86-01-00100; OKI Electric Industry Co., Ltd. v. United States, Court No. 86-01-00099; and Matsushita Communication Industrial Co., Ltd., et al. v. United States, Court No. 86-01-00088. Motorola, Inc. has entered as defendant-intervenor. All of the actions involve appeals from the following administrative proceedings: (1) the final determination of the Department of Commerce, International Trade Administration (ITA) entitled *Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 45,447 (1985) (hereinafter *AD Final Determination*); (2) the final determination of the International Trade Commission (ITC) entitled *Cellular Mobile Telephones and Subassemblies Thereof From Japan,* USITC Pub. No. 1786, 50 Fed. Reg. 51,467 (1985); and the ITA's antidumping duty order entitled *Antidumping Duty Order: Cellular Mobile Telephones and Subassemblies From Japan,* 50 Fed. Reg. 51,724 (1985).

Two common questions of law involved in these consolidated actions concern:

> (a) Whether the ITA's final determination of sales at less than fair value, (*AD Final Determination,* 50 Fed. Reg. 45,447 (1985)), to the extent that it encompassed certain CMT subassemblies and found they were being sold in the United States at less than fair value, was unsupported by substantial evidence on the record, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; and
>
> (b) Whether the final determination of material injury issued by the ITC (*Cellular Mobile Telephones and Subassemblies Thereof From Japan,* USITC Pub. No. 1786, 50 Fed. Reg. 51,467 (1985)), to the extent that it held that an industry or industries in the United States were materially injured by reason of imports of CMTs and CMT subassemblies was unsupported by substantial evidence on the record, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

See, Joint Motion For Consolidation at 2-3, *Mitsubishi Electric Corp.* v. *United States,* Consolidated Court No. 85-12-01858. The Court holds that the determinations by the ITA are supported by substantial evidence on the record and are in accordance with law, but remands the determination of the ITC for further findings in accordance with this decision.

FACTS

Defendant-intervenor Motorola, Inc. (Motorola) filed an antidumping petition with the ITA and the ITC alleging that Japa-

nese-manufactured cellular mobile telephones (CMTs), mobile transceivers and subassemblies imported as "kits" were being sold or likely to be sold at less than fair value (LTFV) in the United States, in contravention of 19 U.S.C. § 1673(1), and that a domestic industry has been materially injured, was threatened with material injury, and establishment of the industry was being materially retarded by imports of the merchandise.

The petition, *Cellular Mobile Telephones and Subassemblies Thereof From Japan* (petition), described the class or kind of merchandise to be covered under the petition as follows:

> The class or kind of merchandise covered by this petition is all cellular mobile telephones manufactured in Japan, plus all mobile transceivers or kits of components and subassemblies manufactured in Japan for use in final assembly of cellular mobile telephones.
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> * * * * * * *
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> This petition also coveres cellular mobile telephone transceivers sold alone and collections of cellular mobile telephone subassemblies ("kits"). The inclusion of mobile transceivers and kits in an antidumping order is essential to prevent the Japanese manufacturers from avoiding the impact of any final relief issued in this proceeding by simply importing mobile transceivers or kits containing most of the necessary subassemblies or components into the United States for final assembly and testing. Wherever this petition refers to cellular mobile telephones imported from Japan, those products should be understood to include also cellular mobile telephones made primarily using kits or mobile transceivers imported from Japan.

Administrative Record, Doc. No. 1 at 10–12, *Cellular Mobile Telephones and Subassemblies Thereof From Japan,* (Case No. A–558–405) (hereinafter Rec. Doc.).[1]

In the petition, Motorola supplied the purported tariff classification of the merchandise to be investigated by the ITA. Plaintiff submitted its request for relief be applied to the merchandise classified as follows:

> D. *Tariff Classification*
>
> Cellular mobile telephones probably should be imported under tariff classification TSUS 685.2943, which is merely a catch-all or clean-up classification. Transceivers, kits or subassemblies for such telephones probably should be imported under the same TSUS classification or perhaps under TSUS 685.2325, 685.2476, 685.2940. 685.2970, or 685.2976. However, *because cellular telephones did not exist when the present tariff classifications were created, and because the breadth and ambiguity of the existing tariff classifications may allow these prod-*

[1]The cellular mobile telephone at issue consists of a transceiver, a "dictionary-sized box of electronics that is usually mounted in an automobile trunk or under the seat," and a control unit which "resembles a modern electronic telephone." Rec. Doc. 1 at 11.

> *ucts to enter without challenge* under numerous different classifications, *it is essential that any relief provided in this proceeding apply* not only to imports under specific TSUS numbers, but also generally *to any cellular mobile telephones,* and *to any* transceivers, *kits or subassemblies for cellular mobile telephones, whatever the tariff classification* of such products.

Rec. Doc. 1 at 12–13 (emphasis added).

The petition also contained an explanation of the extent of Motorola's intent to include CMT subassemblies within the scope of the ITA investigation. The following sets forth Motorola's reasoning:

> Apparently recognizing that their prices are at less than fair value, but nevertheless determined to charge such prices, several Japanese manufacturers have made preliminary plans to circumvent the law by creating the facade of manufacturing cellular mobile telephones in the United States; when in fact that 'manufacturing' uses kits (collections of key components) or mobile transceivers (containing roughly 80% of the cellular mobile telephone's electronics) that are made in Japan.
>
> Even if the final assembly of the pieces of an OKI, Matsushita, NEC or Kokusai mobile telephone occurs in the U.S., those telephones are in reality manufactured in Japan, where they are conceived, financed, designed, engineered, and supervised and where their major subassemblies and components are designed and produced. The administration and ownership of the manufacturing effort, and the research, design, development and creation of components is the heart of the industry. To prevent a clear evasion of the antidumping law by the Japanese, it is essential that not only cellular mobile telephones, but also kits and mobile transceivers for cellular mobile telephones be covered by antidumping protection.
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> * * * * * * *
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> * * * The inclusion of mobile transceivers and kits in an antidumping order is essential to prevent the Japanese manufacturers from avoiding the impact of any final relief issued in this proceeding by simply importing mobile transceivers or kits containing most of the necessary subassemblies or components into the United States for final assembly and testing.

Id. at 6–7, 11. The petition also contained a reference to a citation from an economic journal published in Japan which stated why some Japanese manufacturers of CMTs (specifically OKI, Matsushita, Mitsubishi, and NEC) were deciding to or considering the idea of trying to import subassembly pieces of CMTs into the United States to avoid antidumping charges on complete CMTs. *See id.* at 11 n.1, App. K, *Car Telephone: Sales Battle Intensifies in Europe, U.S.,* June 29, 1984, Nihon Keizai Shimbun.

The petition also set forth allegations that "dumping margins of 50% are common, with some margins as high as 100%." *Id.* at 6.

Motorola stated in the petition that bargain prices of CMTs would exist at a level of two thousand (2,000) dollars or less while Japanese manufacturers offered CMTs at a level of one thousand (1,000) dollars or less. *See id.* at 17, 41. Motorola also contended in is petition losses of fifty (50) million dollars in potential revenues had been lost to Japanese sales, *see id.* at 3, where "the U.S. industry currently supplies less than half of the U.S. market demand for cellular mobile telephones." *Id.* at 8.

Motorola also explained, under its classification section, its concern that the infancy of the industry would possibly not allow for the proper inclusion of the subject merchandise under established classifications and thus allow these products to be entered into the U.S. while evading the dumping relief sought by the domestic industry. *Id.* at 12–13.

On November 5, 1984, the ITC initiated its preliminary investigation on CMTs and subassemblies from Japan. *Cellular Mobile Telephones and Assemblies Thereof From Japan,* 49 Fed. Reg. 45,274 (1984). The ITA initiated its antidumping duty investigation on November 26, 1984 pursuant to 19 U.S.C. § 1673a(c)(2), "to determine whether [CMTs] and subassemblies from Japan are being, or are likely to be, sold in the United States at less than fair value." *Cellular Mobile Telephones and Subassemblies from Japan,* 49 Fed. Reg. 47,076 (1984). The ITA defined the scope of the investigation as including subassemblies in general, not restricting the scope to subassemblies sold only in kits or collections. Specifically, the ITA set forth the scope of the investigation would cover subassemblies as defined as

> circuit modules and/or any other packaged functional assemblage of electronic components, dedicated for use in cellular mobile telephone transceivers or control units. Examples of such assemblies include audio processing modules, signal processing (logic) modules, RF modules, IF modules, synthesizers, duplexers, and power amplifiers.

Rec. Doc. 5 at 4.

On December 4, 1984, the ITA issued preliminary questionnaires to nine Japanese companies (Fujitsu, Hitachi, Ltd. of Japan (Hitachi), Japan Radio Corp., Kokusai Electric Co., Ltd., Matsushita, Mitsubishi, NEC, OKI, and Toshiba), which Motorola had targeted as foreign companies dumping CMTs. Rec. Docs. 18–26. Toshiba reported in its response that it sold a small quantity of kits, and NEC, OKI, and Matsushita reported in their responses sales of subassemblies to the United States. Rec. Docs. 31, 38, 42, 43.

Mitsubishi responded that it had sold CMTs only to the United States and Sweden, and had made no sales in the home market between June 1 and November 30, 1984, the period covered by the investigation. It indicated that it had supplied Nippon Telegraph and Telephone Company with sample units of transceivers "for testing purposes". Rec. Doc. 37 at 2.

The ITA decided to investigate six companies which could provide substantial coverage of sales of CMTs and subassemblies: Hitachi, Matsushita, Mitsubishi, OKI, Toshiba and NEC. Rec. Docs. 15, 16, 69, 70.

Fujitsu, Matsushita, NEC, and OKI, respondents to the investigation, objected to the ITA's inclusion of discrete subassemblies within the scope of the investigation throughout the investigation proceedings. *See e.g.,* Rec. Docs. 35, 41, 43, 189, 300, 303, 307, 308.

On December 18, 1984, the ITC determined by a 4 to 1 vote (Commissioner Leibeler dissenting) that there was a reasonable indication that an industry or industries in the U.S. were materially injured or threatened with material injury by reason of imports of CMTs and subassemblies from Japan allegedly sold in the U.S. at less than fair value, pursuant to 19 U.S.C. § 1673b. *Cellular Mobile Telephones and Subassemblies Thereof From Japan (Preliminary Investigation),* USITC Pub. No. 1629 (1984), 49 Fed. Reg. 50,316 (1984).

Throughout the investigation, Motorola also submitted to the ITA several submissions countering the objections of the six respondent companies concerning discrete subassemblies. On January 15, 1985, Motorola expressed its desire to the ITA to clarify the intent of the petition was to cover sales of discrete subassemblies; and to express it reaffirmed the ITA's and the ITC's determinations that "subassemblies are properly part of the [the] investigation." Rec. Doc. 46 at 2. Motorola also emphasized in its submission the "petition by its title specifically covers subassemblies." *Id.* at 5.

Motorola, in the petition reiterated its concern of including subassemblies within the scope of the investigation to prevent Japanese companies from evading and contravening the antidumping law of the U.S. Motorola expressed its intent not to include "instances in which an independent manufacturer exports a single, simple subassembly for sale to an unrelated U.S. manufacturer, [but] * * * to indicate * * * that the object is imports of the different subassemblies that considered together make up 'most of the necessary subassemblies' for the CMT." *Id.* at 3–4, 5–6. Motorola continued that "[w]hether such subassemblies are packaged together or discretely for shipment, they clearly fall within the parameters and intended scope of the petition." *Id.* at 6.

Motorola also pointed out:

> The only reason that Motorola included subassemblies in its petition was its *well-founded apprehension that failure to do so would permit evasion of an antidumping duty order by Japanese producers,* who would bring major subassemblies into the U.S., claiming that they were not cellular mobile telephones, and then would perform the relatively minor final assembly in the United States.
>
> * * * * * * *
>
> * * * The dumping of transceivers or of collections of major subassemblies * * * for final assembly in the United States does or

> would result in the same injurious impact on the U.S. industry as dumping of completed cellular mobile telephones.
>
> * * * * * * *
>
> Motorola does not seek to include in this proceeding minor subassemblies and components * * * but rather those *major subassemblies that would typically constitute 5% or more of the material cost of the product* * * *.

ITC Rec. Doc. 46 at 27–29 (emphasis added).

On January 25, 1985, Motorola stated, in submitted comments, its concurrence with the ITA's determined scope of the investigation, and on February 21, 1985, Motorola suggested slight modification of the ITA's definition of subassemblies and housing within the scope of the investigation. Rec. Doc. 54 at 12, 83.

Motorola's February 21, 1985 letter also stated: "[t]he petition covers transceivers, control units, and other subassemblies described in the proposed definition above, whether they are imported separately, in sets, or in bulk." Rec. Doc. 83 at 6. Motorola also pointed out only substantial sales of subassemblies consisted of exports from Japanese manufacturers to their U.S. subsidiaries. The only sales Motorola did not intend to cover, Motorola continued, were isolated sales of single subassemblies "on the open market from * * * unrelated manufacturers in Japan", unless there were additional sales of other subassemblies which together constituted a significant portion of a CMT or transceiver, or each isolated sale consisted of a large subassembly which by itself accounted for a significant portion of a CMT or transceiver. *Id.* at 7–8.

The ITA mailed questionnaires to the six investigated companies in the early part of February, 1985. Rec. Docs. 59–63, 70. The questionnaires requested sales and cost information for the merchandise under review covering a time period of June 1, 1984 through November 30, 1984. The ITA indicated that although the merchandise investigated was the same as initially announced in the notice of initiation, the product description of subassemblies was still under investigation.

Concerning the sales information requested, the questionnaires contained what constituted a sale. A *sale* was defined as follows:

> Any sale whose date of sale falls within the period of investigation is subject to investigation. For our purposes, the sales are dated from the point in the transaction where the basic terms of the contract are known and the price to be paid is determined. It is not the date on which the actual price is paid, since that ultimate price may have been influenced by events beyond the control of both parties, such as fluctuations in exchange rates. The date of sale is thus the date on which the agreed-upon price is confirmed. The term 'sale' also includes leasing arrangements which are entered into during the period of investigation.

Rec. Doc. 64 at 39.

On February 13, 1985, Commerce sent the respondents a follow-up letter clarifying certain aspects of the questionnaire, including which sales were under investigation and the definition of "date of sale":

> This investigation covers any sale whose 'date of sale' falls within the period of investigation * * *. Additionally, as a point of further clarification, please note that the 'date of sale' is that point in the transaction where all the terms are finally determined. Any subsequent change, or addition to, the terms of a contract would constitute a new 'date of sale.' Thus, even if a contractual agreement was entered into prior to the period of investigation, if any of the terms of that agreement are modified or altered in any way within the period of investigation, we would consider these contract modifications to be 'sales' which must be reported.
>
> Examples of changes which would alter the date of sale under a typical contract would be:
>
> —Prices which are subject to ongoing negotiation;
>
> —Volume and terms subject to renegotiation;
>
> —Product improvements, feature changes and model changes;
>
> —Additional or changed
>
> Warranty guarantee or servicing arrangements;
> Financing arrangements;
> Delivery terms;
> Lease/rental programs;
> Rebate agreements.

Rec. Docs. 71–76.

Hitachi, Mitsubishi, NEC, OKI and Toshiba submitted responses between March 18 and April 19. 1985. Rec. Docs. 116, 117, 119, 121, 142, 155, 160, 164, 169. Sales or exports of subassemblies were reported by three of the companies. Hitachi indicated it had minor sales of certain spare CMT modules to an unrelated U.S. company for use in a repair and warranty program. Rec. Doc. 277 at 7. NEC responded that it exported subassemblies to a wholly-owned subsidiary in the United States manufacturing CMTs and sold spare kits and accessory kits in the United States. Rec. Docs. 38, 171, 291. OKI indicated it sold subassemblies to a related manufacturer of CMTs in the United States. Rec. Docs. 119, 182, 310. Mitsubishi indicated sales of CMTs to only the United States and Sweden in its response and subsequent amendments to the response. Rec. Docs. 116, 155. The ITA verified the five responses in the several offices of companies in the United States and Japan in April, May and June of 1985. Rec. Docs. 188, 257, 263, 267, 288–289, 295, 322.

An analyst at the ITA discovered, during the verification proceedings, that Mitsubishi had made sales of CMT transceivers in the home market during the period of investigation which sales it had failed to report. The analyst also ascertained that Mitsubishi had

qualified as a supplier of CMTs for Nippon Telephone and Telegraph Company (NTT) during the period of investigation. Rec. Doc. 257 at 23. The analyst verified Mitsubishi had shipped test samples of transceivers to NTT's subsidiary in August and September of 1984, as it had reported in its preliminary questionnaire response. Mitsubishi received compensation for the samples in November 1984. *Id.* at 25. The analyst from the ITA also discovered other sales of transceivers to NTT's subsidiary in Japan. He examined three purchase orders dated within the period covered by the investigation and noted the purchase orders contained the date of order, date of delivery, quantity, unit price and total price. *Id.* at 24–27.

Although the analyst from the ITA did not discover any documents in which Mitsubishi had formally accepted the orders, his report indicated Mitsubishi's headquarters and plant had issued production orders for the same merchandise which was included in the sales in May 1984. The orders showed the beginning and final delivery dates of the merchandise, the total approximate price, estimated cost of sale, the customer, and the total quantity. The date of the customer order was left blank on the forms. Rec. Doc. 257 at 25–26. The analyst noted Mitsubishi officials claimed Mitsubishi issued production orders "at its own risk" based on anticipated sales orders from the NTT subsidiary. *Id.* at 25.

On May 24, 1985, Motorola submitted comments about Matsushita and NEC. It reiterated its stance any determination issued by the ITA from its investigation should include "all [CMTs], transceivers, control units, and subassemblies for CMTs manufactured by [the Japanese manufacturers] and imported into the United States." Rec. Doc. 202 at 3–4.

Motorola also commented on the controversy of the inclusion of the subassemblies. Those observations were as follows:

> there is often a necessity for flexibility as the Department determines the best and most practicable method of applying the antidumping law to the products identified in the petition. In this case, subassemblies were clearly included in the petition, which was titled *"Cellular Mobile Telephones and Subassemblies Thereof from Japan,"* and while the investigation may have shown that the packaging of some of those subassemblies was somewhat different than Motorola's understanding, subassemblies were clearly a target of the petition and thus are properly within the scope of the investigation.

Rec. Doc. 309 at 81. Motorola also responded to a request from Matsushita that replacement parts be excluded from the investigation. Motorola stated "the Department should accede to Matsushita's request only if it is fully satisfied that 'repair' subassemblies are so easily and verifiably distinguishable from 'production' subassemblies that there is no possibility of circumvention of an antidumping duty order." Rec. Doc. 309 at 92.

On June 11, 1985, the ITA published its affirmative preliminary determination "that cellular mobile telephones and subassemblies

from Japan [were] being, or [were] likely to be,. [sic] sold in the United States at less than fair value." *Cellular Mobile Telephones and Subassemblies From Japan; Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 24,554 (1985). The ITA explained the scope of the investigation as follows:

> The products covered by this investigation are cellular mobile telephones (CMTs), CMT transceivers, CMT control units, and subassemblies dedicated for use in CMTs. CMTs are radio-telephone equipment designed to operate in a cellular radio-telephone system, i.e., a system that permits mobile telephones to communicate with traditional land-line telephones via a base station, and that permits multiple simultaneous use of particular radio frequencies through the division of the system into independent cells, each of which has its own transceiving base station. Each CMT generally consists of (1) a transceiver, i.e., a box of electronic subassemblies which receives and transmits calls; and (2) a control unit, i.e., a handset and cradle resembling a modern telephone, which permits a motor-vehicle driver or passenger to dial, speak, and hear a call. They are designed to use motor vehicle power sources. Cellular transportable telephones, which are designed to use either motor vehicle power sources or, alternatively, portable power sources, are included in this investigation.
>
> Subassemblies are any completed or partially completed circuit boards, circuit modules and/or any packaged assemblage of electronic components, the value of which is equal to or greater than five dollars, and which are dedicated for use in CMT transceivers or control units. Examples of such subassemblies are circuit boards and/or modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter, and exciter.

Id. at 24,554–55.

The ITA also set forth its reasoning concerning the inclusion of subassemblies within the category of products investigated. The ITA stated:

> [t]he determination to include subassemblies within the scope of the investigation was based on the need to prevent circumvention of any antidumping order on CMTs through the importation of major CMT subassemblies, and the Department's broader conclusion that the investigation properly should include subassemblies. In this regard, Motorola's petition requested that we include 'kits of components and subassemblies' in the investigation.
>
> Two of the companies investigated export CMT subassemblies to the United States to related companies which subsequently perform some form of further manufacture or assembly before

> selling the completed CMTs to unrelated parties. If the investigation were limited to completed CMTs alone, none of these importations would be subject to an antidumping order, even if all of the subassemblies were of Japanese origin and were being sold at less than fair value, and the complete CMT was 'substantially' of Japanese origin.

Id. at 24,555.

The ITA also published its positions on respondents' arguments the ITA has no authority to include separately imported discrete subassemblies within the scope of the investigation. The ITA responded as follows:

> First, the Department [ITA] takes the position that CMT subassemblies are the same 'class or kind' of merchandise as complete CMTs. This determination is based on a consideration of the following factors: (1) General physical characteristics, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the merchandise in question, and (4) the channels of trade in which the merchandise moves. Since the scope of this investigation only includes those subassemblies that are 'dedicated for use' in complete CMTs, both the ultimate use and the ultimate purchaser of the CMT subassemblies are the same as for the complete CMTs. Thus, the second and the third criteria outlined above are met. Similarly, based on the evidence in the record, the Department determines that CMT subassemblies, as defined in this investigation and complete CMTs move in the same channel of trade. Indeed, this is the very reason the Department feels it necessary to include CMT subassemblies within the scope of this investigation since otherwise any resulting order could easily be circumvented. With respect to the first criterion, the Department does not think that the fact that CMT subassemblies have, in some respect, different physical characteristics from complete CMTs should be controlling in this instance. As a result, the Department concludes that CMT subassemblies which are dedicated for use in CMTs are within the same 'class or kind' of merchandise as complete CMTs. See, *Antidumping Order; Cell Site Transceivers from Japan,* 50 FR 307.
>
> Second, the Department's view is that respondents are taking an unduly narrow reading of the petition and that the Department's definition of scope is simply a clarification of what was set forth in the petition. Petitionerss [sic] definition of kits referred to collections of 'key' compoenents, [sic] which we have taken to mean 'major' subassemblies. The whole purpose of including subassemblies in this investigation is to prevent evasion of the antidumping law. It would be illogical to make a distinction between those subassemblies that are shipped discretely in separate containers and those that are shipped together in one

> box. Limitations as to packaging would simply be an invitation to evade the antidumping law through changes in packaging.
>
> Third, whether or not Motorola's petition explicitly covers discrete subassemblies is not dispositive, since the Department has an inherent power to establish the parameters of the investigation so as to carry out its mandate to administer the law effectively and in accordance with its intent. See, 19 CFR 353.37(b).
>
> * * * * * * *
>
> Finally, the Department has considered respondents' (principally Matsushita's and OKI's) suggestion that the order be designed so as to exclude importations of subassemblies that are incorporated into CMTs by U.S. facilities that add more than a nominal value. It was proposed, for example, that each respondent be given an opportunity to make an affirmative showing that the value it adds in the United States to imported CMT subassemblies is so substantial that it ought to be removed from the scope of the order. The Department feels that this approach is not feasible from an administrative standpoint, and that it would result in a discriminatory application of the antidumping law.
>
> Accordingly, the Department has included CMT subassemblies as defined above within the scope of the investigation.

Id. at 24,555–56.

The ITC instituted its injury investigation following the ITA's affirmative preliminary determination. The ITC investigation concerned whether or not a domestic industry was materially injured, threatened with material injury, or the establishment of a domestic industry was materially retarded, by reason of less than fair value imports of CMTs and subassemblies from Japan. During this investigation, the ITC mailed out questionnaires to known domestic producers, known importers of CMTs and subassemblies, and purchasers of CMTs in the domestic market. The ITC also sent out investigators to visit the various facilities of those questioned and gathered information.

On October 31, 1985, the ITA published its final affirmative determination on the CMTs. *AD Final Determination*, 50 Fed. Reg. 45,447 (1985). The ITA determined CMTs and subassemblies from Japan were being or were likely to be, sold in the U.S. at less than fair value pursuant to 19 U.S.C. § 1673d(a). The weighted average margin percentage of dumping found for the certain manufacturers/sellers/exporters were as follows: OKI, 9.72; Hitachi, 2.99; Mitsubishi, 87.83; NEC, 95.57; Matsushita, 106.60; and Toshiba, 0.0. *Id.* at 45,460.

The ITA's published notice reiterated a substantial amount of its reasoning from its preliminary determination notice published in December of 1984. The final determination covered, inter alia, CMT

subassemblies, the definition of which the ITA further clarified as follows:

> Subassemblies are any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units. The term 'dedicated exclusively for use' only encompasses those subassemblies that are specifically designed for use in CMTs, and could not used [sic], absent alteration, in a non-CMT device. The Department selected the five dollar value for defining the scope since this is a value that it has determined is equivalent to a 'major' subassembly. The Department feels that a dollar cut-off point is a more workable standard than a subjective determination such as whether a circuit module is 'substantially complete.' Examples of subassemblies which may fall within this definition are circuit modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter, and exciter. The presumption is that CMT subassemblies are covered by the order unless an importer can prove otherwise. An importer will have to file a declaration with the Customs Service to the effect that a particular CMT subassembly is not dedicated exclusively for use in CMTs or that the dollar value is less than $5, if he wishes it to be excluded from the order.

Id. at 45,448. The period of the investigation was June 1, through November 30, 1984.

Concerning the ITA's method of calculating United States price for OKI's subassemblies, the ITA stated in the determination:

> For OKI, we used exporter's sales price (ESP) to represent the United States price because the merchandise was sold to unrelated purchasers after importation into the United States. For these sales, we made deductions, where appropriate, for foreign inland freight and handling charges, air or ocean freight, U.S. customs duties, U.S. inland freight and brokerage, indirect selling expenses incurred in the United States and other direct selling expenses incurred in the United States such as credit, advertising reserve, warranties and post-sale warehousing. In calculating the ESP for OKI, we also deducted the value added to the imported units through further manufacture prior to sale in the United States.

Id. at 45,450

The ITA, along with its other calculations, calculated the United States price and foreign market value for Matsushita's subassemblies from information in the petition as the best information available because Matsushita did not respond to the ITA antidumping questionnaires.

Mitsubishi submitted comments to the ITA during the proceedings arguing, *inter alia*, the ITA should not use Mitsubishi home market sales as a basis for foreign market sales because they were inadequately small in relation to its third country sales. Mitsubishi supported its assertion with the following:

> 1. That MELCO's [Mitsubishi] shipment of a small quantity of test samples to Nippon Telephone and Telegraph (NTT) were not sales made in the ordinary course of trade; 2. that the informal and unwritten agreement between MELCO and NTT could not constitute a sale; and 3. that NTT's written purchase orders did not constitute 'sales' since MELCO did not 'confirm' these purchase order [sic], nor did title to the goods pass at that point, and therefore no sales occurred until MELCO actually delivered the CMTs. MELCO also argues that its home market sales of CMTs were not 'such or similar' to its U.S. sales within the meaning of 771(16)(C) of the Act.

Id. at 45,451.

The ITA responded to these arguments as set forth below:

> The [ITA] has determined that, based on 3 NTT purchase orders, MELCO [Mitsubishi] made sufficient commercial sales in the home market during the period of investigation so as to constitute a 'viable' home market within the meaning of 19 CFR 353.4. In reaching this determination the [ITA] did not have to determine whether the sale of test samples to NTT were sales made in the ordinary course of trade since its finding would be the same regardless. The [ITA] has determined that the date purchase orders were issued by NTT is the appropriate date for determining date of sale. As the [ITA] stated in its questionnaire in this case, 'sales are dated from the point in the transaction where the basic terms of the contract are known and price to be paid is determined * * *. The date of sale is thus the date on which the agreed-upon price is confirmed.' All of these conditions were met when NTT issued purchase orders to MELCO. Under the [ITA's] definition, there is no requirement that title to the goods pass. Furthermore, the fact MELCO did not 'confirm' the purchase orders is irrelevant since it does not appear that there was any requirement or understanding that it would do so. The fact that subsequent shipping and invoicing by MELCO (absent confirmation) was done in accordance with the terms of each purchase order is further indication that these orders were an accurate confirmation of the parties' understanding.
>
> Furthermore, the [ITA] has determined that MELCO's home market sales of CMT transceivers were 'such or similar' to its U.S. CMT sales * * *. Thus, under the [ITA's] analysis, MELCO's home market CMT sales during the period of investigation were in excess of five percent of its third country sale and therefore its home market was 'viable' within the meaning of 19 CFR 353.4.

Id.

The ITA, following the above rationale, excluded from its calculation of U.S. price all Hitachi shipments made *during* the investigation because requirements contracts entered into by Hitachi were concluded prior to the investigation. The ITA explained its reasoning as follows:

> [The ITA has] carefully examined the terms of Hitachi's requirements contract and have determined that the date was [sic] executed should be used as the appropriate date of sale for purposes of determining when a U.S. sale was made. This decision is based on three factors. First, the requirements contract was a binding agreement as of the date it was entered into * * *. Second, by the terms of the contract, the price of the CMT was agreed to irrevocably. Third, while the number of CMTs to be sold was not precisely set at the date the contract was executed, the quantity was established at that time in the sense that the customer agreed to purchase all of the CMTs that it may 'require' for a specified period of time. Thus, there is nothing more that the parties to the contract needed to agree to. The actual quantity purchased was to determined [sic] by factors outside their control, such as marked [sic] forces * * *.

Id. at 45,456.

On December 17, 1985, the ITC published notice it had determined:

> [o]n the basis of the record developed in the subject investigation, * * * [and] pursuant to section 735(b)(1) of the Tariff Act of 1930 (19 U.S.C. 1673(b)(1)) * * * industries in the United States are materially injured by reason of imports from Japan of cellular mobile telephones and subassemblies thereof, provided for in items 685.28 and 685.32 of the Tariff Schedules of the United States, which have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Cellular Mobile Telephones and Subassemblies Thereof From Japan, 50 Fed. Reg. 51,467–68 (1985) (footnotes omitted). Vice Chairwoman Liebeler dissented in the determination.

In its publication of the determination, the ITC noted the following:

> We recognize that there are many complexities in this investigation, including the relatively recent commencement of production of CMTs for the U.S. market, the rapid expansion of the U.S. market, the entry of new domestic producers throughout the period of investigation, and the assessment of the impact of imports on these particular industries. Although many of the indicators relevant to the condition of the domestic industries are positive and show improving trends, the domestic industries producing CMTs and subassemblies are showing financial losses and firms in the domestic industry have experienced declining employment or have chosen to cease production of CMTs and subassemblies. We have concluded that the LTFV sales of Japanese CMTs and subassemblies have had a negative

> impact on the performance of the domestic industry sufficient to find material injury by reason of such imports.

Cellular Mobile Telephones and Subassemblies Thereof From Japan, USITC Pub. No. 1786 at 3 (Dec. 1985).

The ITC also stated in the publication its intended scope of investigation for the subject merchandise, as set forth below in pertinent part:

> The domestic industry in a title VII investigation consists of the 'domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.' Section 771(10) defines like product as 'a product which is like or, in the absence of like, most similar in characteristics and uses with, the article subject to an investigation * * *.'
>
> The imported merchandise which is the subject of this investigation are CMTs and subassemblies of CMTs.
>
> *   *   *   *   *   *   *
>
> In this investigation there are also imports of CMT subassemblies. These subassemblies 'compartmentalize' certain functions common to every CMT. The basic functions incorporated into one or more of the major subassemblies include: audio processing, signal processing (logic), frequency transmitting, frequency receiving, frequency comparing (synthesizing), duplexing (enabling sending and receiving at the same time), and power amplifying.
>
> We determine that subassemblies dedicated to the performance of each of the essential functions of a complete CMT constitute a separate like product. In addition to the obvious differences in terms of physical characteristics, various subassemblies are not substitutable or interchangeable because each has a specific function in the transceiver or control unit and each firm's allocation of function between various subassemblies varies. Each of the subassemblies at issue is necessary to the function of the complete unit. These subassemblies, however, represent a prior stage of production, and thus the amount of further processing is extensive.

Id. at 3–4, 6–8 (footnotes omitted).

The ITC explained its findings with respect to domestic producers, domestic industries and related parties. The explanation is set forth, in pertinent part, as follows:

> Based upon our analysis of the factors set forth above, we determine that those firms producing transceivers or control units in the United States are domestic producers within the meaning of section 771(4)(A). In addition, we determine that certain Japanese firms that have commenced significant pro-

duction-related activity in the United States are also domestic producers as of the time when a specific firm commenced those activities in the United States. We note, however, that based on our discussion of related parties that follows, these firms have been excluded from our analysis regarding injury to the domestic industry over the entire period of the investigation.

* * * * * * *

With regard to the Japanese-owned firms that we found to be domestic producers, these firms achieved this status only recently. Thus, these firms achieved this status only recently. Thus, these firms have benefited from importation of either subassemblies or complete CMTs during the vast majority of the period of investigation. Although these firms represent a sizeable portion of domestic production during the brief time that they have been domestic producers, exclusion of these firms under the related parties provision does not adversely affect the Commission's analysis of the condition of the domestic industries for the entire period of the investigation. Thus, we have determined to exclude from the domestic industries Japanese firms that have only recently commenced domestic production in the United States.

* * * * * * *

Available data on the condition of these domestic industries exist only at the level of complete CMTs. Thus, we have applied section 771(4)(D) and assessed the condition of these industries in terms of data on complete CMTs.

Id. at 9–12 (footnotes omitted).

On December 9, 1985, the ITA published its antidumping duty order encompassing CMT subassemblies as defined in the ITA's determination. 50 Fed. Reg. 51,724 (1985). During December 1985 and January 1986, the various petitioner-plaintiffs filed their individual actions challenging the ITA's final affirmative determination, its antidumping order, and the ITC's affirmative injury determination. On May 19, 1986, the Court consolidated the various actions for determination. On June 2, 1986, the Court granted Motorola's motion for defendant-intervenor status.

Discussion

Plaintiffs bring their actions pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i), and § 1516a(a)(2)(A)(i)(II), and 28 U.S.C. § 1581(c) to challenge the ITA's final affirmative antidumping duty determination (50 Fed. Reg. 45,447 (1985)), and antidumping duty order (50 Fed. Reg. 51,724 (1985)), and the ITC's final affirmative injury determination (USITC Pub. No. 1786, 50 Fed. Reg. 51,467 (Dec. 1985)).

Plaintiffs' challenge to the ITA and ITC determinations can be categorized into major issues under both the ITA and ITC determinations. Concerning the ITA determination, the first category covers the issue whether or not the ITA's determination to include dis-

crete CMT subassemblies within the scope of its investigation is supported by substantial evidence in the record and otherwise in accordance with law. The second and third categories can be characterized by the issues of whether or not the ITA's inclusions of discrete CMT subassemblies within the final affirmative LTFV antidumping duty determination and the final antidumping order, respectively, are supported by substantial evidence on the record and are otherwise in accordance with law. The fourth category covers whether or not there was substantial evidence on the record that imported discrete CMT subassemblies were sold at less than fair value, and the fifth category covers whether or not the ITA's treatment of the issuance of purchase orders as sales for the calculation of foreign market value for Mitsubishi's merchandise was supported by substantial evidence on the record and was otherwise in accordance with law.

Concerning the challenges to the ITC determination, the first category concerns the issue of whether or not the ITC erred in its analysis of material injury to the United States CMT subassembly industries by invoking the "product lines" provision of 19 U.S.C. § 1677(4)(D) in its investigation, but failing to obtain subassembly specific data. The second category is the issue of whether or not the ITC violated the statutory requirement 19 U.S.C. § 1673 by imposing duties on imports of discrete CMT subassemblies when the ITC allegedly found only injury with respect to imports of *major* subassemblies.

Commerce is given broad discretion to administer the antidumping law. Upon review of an antidumping duty determination, the Court must sustain the ITA's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1982). The substantial evidence test restricts the scope of the Court's review of the agency record. If the ITA's interpretation is sufficiently reasonable, it will be sustained and it need not be the only reasonable interpretation. *American Lamb Co.* v. *United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986); *Atcor, Inc.* v. *United States,* —— CIT ——, ——, 658 F. Supp. 295, 299 (1987).

Substantial evidence is recognized as:

> '[M]ore than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Substantial evidence 'is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence.'

Matsushita Electric Industrial Co. v. *United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (quoting *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 229 (1938) and quoting *Consolo* v. *Federal Marine Comm'n,* 383 U.S. 607, 619–20 (1966) respectively).

The imposition of antidumping duties is governed by 19 U.S.C. § 1673 *et seq.* The general scheme of the antidumping law is set forth in § 1673 in pertinent part as follows:

> If—
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C.A. § 1673 (1985).

Relevant to this action, the parties challenge both the ITA's and the ITC's determinations. The first issue raised under these challenges concerns the ITA's determination to include discrete subassemblies within the scope of its investigation initiated upon the filing of Motorola's petition.

The procedure governing the petition stage of an investigation is set forth in 19 U.S.C. § 1673a. The portions of that statute relevant to the instant action are set forth as follows:

> **(b) Initiation by Petition**
>
> (1) **Petition requirements.**—An antidumping proceeding shall be commenced whenever an interested party * * * files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the administering authority and the Commission may permit.
>
> (2) **Simultaneous filing with Commission.**—The petitioner shall file a copy of the petition with the Commission on the same day as it is filed with the administering authority.

(c) Petition determination

Within 20 days after the date on which a petition is filed under subsection (b) of this section, the administering authority shall—

(1) determine whether the petition alleges the elements necessary for the imposition of a duty under section 1673 of this title and contains information reasonably available to the petitioner supporting the allegations.

(2) if the determination is affirmative, commence an investigation to determine whether the class or kind of merchandise described in the petition is being, or is likely to be, sold in the United States at less than its fair value, and provide for the publication of notice of the determination in the Federal Register, and

(3) if the determination is negative, dismiss the petition, terminate the proceeding, notify the petitioner in writing of the reasons for the determination, and provide for the publication of notice of the determination in the Federal Register.

19 U.S.C. § 1673a(b)(c) (1985).

Plaintiffs argue the ITA, without authority, expanded the scope of the investigation initiated by Motorola entitled "In the Matter of Cellular Mobile Telephones and Subassemblies Thereof From Japan." Specifically, plaintiffs claim the petition described only complete CMTs, CMT transceivers, and kits of major CMT subassemblies for use in final assembly of CMTs; the ITA exceeded its authority under 19 U.S.C. § 1673a(c)(2) by broadening the scope of the investigation beyond that "class or kind of merchandise described in the petition" by including the discrete subassemblies. Also challenged by plaintiffs is the determination by the ITA that the petition contained sufficient evidence of dumped sales to include the discrete CMT subassemblies.

Defendant, supported by Motorola, contends the petition, on its face, clearly contained the petitioner's intent to include discrete CMT subassemblies within the scope of the investigation and was supported by subsequent amendments from Motorola during the investigation. Defendant further argues the discrete CMT subassemblies are "the same class or kind" of merchandise described in the petition, and evidence submitted in the petition provides adequate evidence to include discrete CMT subassemblies in the investigation.

It is clear from the record Motorola intended to include discrete CMT subassemblies within the scope of the investigation. Although the precise language does not set forth "discrete" CMT subassemblies, the Court finds the evidence present that indicates Motorola intended discrete subassemblies to be covered in the petition as the same class or kind of merchandise to be investigated for purposes of

the antidumping investigation. Accordingly, the ITA's determination was substantiated by evidence on the record and was in accordance with law.

This Court has sustained the ITA's treatment of related subassemblies as within the class or kind of merchandise described in a petition that lacked specificity as to those subassemblies when there exists no adequate information in regard to those related subassemblies to enable the preparation of the petition to be more specific. *Kokusai Electric Co. Ltd.* v. *United States,* —— CIT ——, ——, 632 F. Supp. 23, 27 (1986). The Court has also recognized:

> [the] distin[ction] between the authority of the Customs Service to classify according to tariff classifications (19 U.S.C. § 1500) and the power of the agencies administering the antidumping law to determine a class or kind of merchandise. *The determinations under the antidumping law may properly result in the creation of classes which do not correspond to classifications found in the tariff schedules or may define or modify a known classification in a manner not contemplated or desired by the Customs Service. Within the context of an antidumping proceeding the administering agency, at the proper time, can define the class in its terms.*

Royal Business Machines v. *United States,* 1 CIT 80, 87 n.18, 507 F. Supp 1007, 1014 n.18 (1980), *aff'd,* 69 CCPA 61, 669 F.2d 692 (1982) (emphasis added).

At the time of the filing of the petition, the CMT industry was very young. The petitioner's explanation of its concern for dumping was couched in the context of a quickly developing new industry where precise technical language and available knowledge to describe the industry practices and tactical maneuvering of importing was scant or unavailable. Rec. Doc. 1 at 8. The term "kits of subassemblies" reflected this lack of knowledge where it apparently was not anticipated that other forms of importation of subassemblies could be performed. The Federal Communications Commission had announced only recently in 1982 the approval of CMTs for operation. *Id.* at 1–2. The petition stated the "class or kind of merchandise" to be covered by the petition was to include "all * * * subassemblies manufactured in Japan for use in final assembly of cellular mobile telephones." *Id.* at 10.

Motorola explicitly stated its concern and purpose in filing the petition was as follows:

> This petition also covers cellular mobile telephone transceivers sold alone and collections of cellular mobile telephone subassemblies ("kits"). The inclusion of mobile transceivers and kits in an antidumping order is *essential to prevent the Japanese manufacturers from avoiding the impact of any final relief issued in this proceeding by simply importing mobile* transceivers or *kits* containing most of the necessary subassemblies or components into the United States for final assembly and test-

> ing. Wherever this Petition refers to cellular mobile telephones imported from Japan, those products should be understood to include also cellular mobile telephones made primarily using kits or mobile transceivers imported from Japan.

Id. at 11–12 (emphasis added). Motorola buttressed this concern by referring to the plans of Japanese manufacturers "to circumvent the law by creating the facade of manufacturing [CMTs] in the United States; when in fact that 'manufacturing' uses kits * * * that are made in Japan." *Id.* at 6. Motorola also, in its petition, cited to an article describing tactical ploys the Japanese industry had used or planned to use in reaction to fear of a dumping charge by the U.S.

Further concern was expressed in the petition by reference to alleged substantial margins of dumping from 50 to 100 *per centum*, and potential lost revenues of fifty million dollars.

Motorola appeared to attempt to clarify the petition by subsequent submission to ITA during the investigation, as set forth in 19 U.S.C. § 1673a(b)(1). Although the petition appeared clear in its intent, these further submissions only reinforce the fact that discrete CMT subassemblies were within the scope of the investigation. Motorola repeatedly affirmed the ITA's determination that the scope of investigation included subassemblies defined as follows:

> circuit modules and/or any other packaged functional assemblage of electronic components, dedicated for use in cellular mobile telephone transceivers or control units. Examples of such assemblies include audio processing modules, signal processing (logic) modules, RF modules, IF modules, synthesizers, duplexers, and power amplifiers.

Rec. Doc. 5 at 4. This list of items included the discrete CMT subassemblies upon which this action rests. Motorola stated explicitly: "Whether such subassemblies are packaged together or discretely for shipment, they clearly fall within the parameters and intended scope of the petition." Rec. Doc. 46 at 6. The petition also gave notice and a clear indication to respondents the nature of petitioner's concern and the class or kind of merchandise upon which petitioner was requesting an investigation.

Also important to note is Motorola's classification explanation in its petition of those goods to be covered by the petition that could be identified in the Tariff Schedules as well as new products created beyond expectation of the tariff schedules including, "generally * * * *any kits * * * or subassemblies* for [CMTs], whatever the tariff classification." Rec. Doc. 1 at 13 (emphasis added).

Where the intent and purpose of the petitioner is clearly evinced in the petition, undergirded by a reasonably adequate description and classification of the goods to be investigated, and where recent technological advances render known and established classifications and descriptions inadequate to cover the intended merchandise of which the complaint is made, it is not unreasonable or contrary to

law for the ITA to enlarge the scope of the investigation to account for these factors and to sufficiently provide coverage of merchandise intended to be covered in the petition. This is certainly no less true when the petitioner, within the statutory provisions of 19 U.S.C. § 1673a(b)(1) and upon allowance by the administering other agency, submits amendments and clarifying statements to the agency during the investigation concurring with the agency's determination.

The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion to expand the language of a petition to encompass the literal intent of the petition, not to the exclusion of other factors, but certainly, with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law. The ITA was not acting contrary to law or in a conflicting manner with substantial evidence on the record in looking to the express language and intent of the petition as expressed by petitioner. The petition sets forth the type of injury experienced by a broad definition of the merchandise suspected of causing the injury. Whether actually entered assembled, partially assembled, unassembled but together, unassembled but partially together, or totally separated, merchandise may not always be described in precise terms in a petition.[2] It is the expressed intent, supported by substantial evidence on the record which emphasizes that intent, that counts as a substantial indication of what is encompassed within the scope of the investigation. *See Diversified Products Corp.* v. *United States,* 6 CIT 155, 159, 572 F. Supp. 883, 887 (1983) ("[T]his court implicitly recognized that the ITA has the authority not only to define the scope of an antidumping duty investigation but also to clarify the statement of its scope * * *.")

The ITA has the authority[3] to define and/or clarify what constitutes the subject merchandise to be investigated as set forth in the petition containing the intent of petitioner expressed in as specific and definite terms, descriptions, and language as reasonably expected of petitioner, taking into consideration such factors as the newness of the industry, the lack of available information due to such infancy, the shroud of secrecy a foreign industry might hang over its methods of importation, and the known tactics of foreign industries attempting to avoid a countervailing duty order. This scope of investigation may be clarified by the ITA dependent upon such additional factors as petitioner's amendments to the petition, affirmative or negative in nature, pursuant to 19 U.S.C. § 1673a(b)(1); and additional information gathered in an investigation that adds further knowledge and content to the already scant or inadequate in-

[2] The Court agrees with the ITA's reasoning that: "Limitations as to packaging would simply be an invitation to evade the antidumping law through changes in packaging." *Cellular Mobile Telephones and Subassemblies From Japan; Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. 24,554, 24,555 (1985).

[3] Inasmuch as the ITA, reiterated by defendant in its brief, claims "an inherent power to establish the parameters of the investigation," *see AD Final Determination,* 50 Fed. Reg. at 45,449, the Court stresses that such authority is bounded by the statutory guidelines established by Congress and subject to review by this Court.

formation available on such an infant industry. This comports with Congress' intent to allow the agency some discretion in determining such circumstances on a case by case basis. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 63 (1979) ("The committee intends the determination as to the information 'reasonably available' to a petitioner to be made in light of the circumstances of each petitioner. Information may be reasonably available to one petitioner but not to another because of differing resources or other characteristics.")

The Court notes the ITA further explained its reasoning for defining and clarifying the scope of the investigation to include CMT subassemblies and discrete subassemblies as the same "class or kind" of merchandise as complete CMTs. *See, AD Final Determination,* 50 Fed. Reg. at 45,448.[4] This method of analysis has been approved for use by this Court in prior decisions concerning the scope of the investigation as it applies to administrative reviews. *See Diversified Products Corp.* v. *United States,* 6 CIT 155, 572 F. Supp. 883 (1983), *Kyowa Gas Chemical Industry Co., Ltd.* v. *United States,* 7 CIT 138, 582 F. Supp. 887 (1984). Upon review of the record, the Court holds the ITA's utilization and subsequent analysis, pursuant to the five factors it considered, was supported by substantial evidence on the record, was in accordance with law, and further supports the ITA determined scope of investigation of CMT and CMT subassemblies.

Plaintiffs also charge that the ITA's definition of CMT subassemblies was an abuse of its administration of the antidumping law by its overreaching broadness including subassemblies that (1) individually do not account for a significant portion of the value or a complete CMT, especially at the five dollar or more value cut off level;

[4] The ITA's stated explanation is set forth below:

I. The Department takes the position that CMT subassemblies that are 'dedicated exclusively for use' in the CMTs are the same 'class or kind' of merchandise as complete CMTs. This determination is based on a consideration of the following factors: (1) General physical characteristics, (2) the expectations of the ultimate purchasers, (3) the channels of trade in which the product is sold, (4) the manner in which the product is advertised and displayed, and (5) the ultimate use of the merchandise in question. These factors have been recognized and utilized by the Court of International Trade as appropriate criteria in determining whether a new product was within the 'class or kind' of merchandise described in a prior antidumping finding, and they are likewise instructive where, as here, the question is the initial formulation of the scope of the order. See *Diversified Products Corp.* v. *U.S.,* 572 F. Supp 883 (C.I.T. 1983), *Kyowa Gas Chemical Industry Co., Ltd.* v. *U.S.,* 5 ITRD 2131 (1984). Since the scope of this investigation only includes those subassemblies that are 'dedicated exclusively for use' in complete CMTs, both the ultimate use and the ultimate purchaser of the CMT subassemblies are the same as for the complete CMTs, since by definition, the CMT subassemblies could not be used in any other device. Thus, the second and the fifth criteria outlined above are met.

Similarly, based on the evidence in the record, the Department determines that CMT subassemblies, as defined in this investigation, and complete CMTs move in the same channel of trade. Indeed, this is the very reason the Department feels it necessary to include CMT subassemblies within the scope of this investigation since otherwise any resulting order could easily be circumvented. Those subassemblies manufactured in-house by CMT producers move in the same channels of trade as the CMT of which they are a part because such subassemblies are not 'traded' except to the extent they are sold after they have been used in CMT production. While some CMT components may be purchased by CMT manufacturers from unrelated parties, the Department has reason to believe that such separately traded items may not meet the 'dedicated exclusively for use' criteria, and therefore would not be covered by the scope of any order.

Similarly, since there is no separate channel of trade for CMT subassemblies, the only respect in which they are advertised and displayed is in the form of complete CMT units. Thus, the fourth criterion is met.

Finally, with respect to the first criterion, the Department does not think that the fact that CMT subassemblies have, in some respect, different physical characteristics from complete CMTs should be controlling in this instance. The only difference between the two is that complete CMTs are, essentially, assembled CMT subassemblies. As a result, the Department concludes that CMT subassemblies which are dedicated exclusively for use in CMTs are within the same 'class or kind' of merchandise as complete CMTs * * *.

50 Fed. Reg. at 45,448.

(2) taken together with other imported subassemblies do not constitute a substantially complete CMT; and (3) are designed and intended for use in the construction of larger CMT subassemblies. Plaintiffs argue that such insignificant discrete subassemblies, when compared in value, addition, and proportionate contribution to a completed CMT, do not even attempt to be a circumvention of an antidumping order covering CMT subassemblies upon their importation into the U.S. In contradiction to the ITA and Motorola, the plaintiffs argue inclusion of the discrete CMT subassemblies is not essential to prevent evasion of an antidumping duty order.

Certain plaintiffs also complain the inclusion of discrete CMT subassemblies within the broad definition of a CMT subassembly under investigation impinges on U.S.-based Japanese firms importing discrete CMT subassemblies into the U.S. *not* for final assembly into complete CMTs *but* for further assembling with other CMT subassemblies manufactured in the U.S. to result in a complete CMT.

The ITA, in its preliminary determination, published the scope of the investigation to cover CMTs and "subassemblies dedicated for use in CMTs." *Cellular Mobile Telephones and Subassemblies From Japan; Preliminary Determination of Sales at Less Than Fair Value,* 50 Fed. Reg. at 24,554. The ITA was clear in its definition of what constituted a subassembly for purposes of the investigation:

> Subassemblies are any completed or partially completed circuit boards, circuit modules and/or any packaged assemblage of electronic components, the value of which is equal to or greater than five dollars, and which are dedicated for use in CMT transceivers or control units. Examples of such subassemblies are circuit boards and/or modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter, and exciter.

Id. at 24,554–55.

The ITA published a further delineated definition of what was a subassembly in its final affirmative determination and explained why such delineations had been made:

> Subassemblies are any completed or partially completed circuit modules, the value of which is equal to or greater than five dollars, and which are dedicated exclusively for use in CMT transceivers or control units. The term 'dedicated exclusively for use' only encompasses those subassemblies that are specifically designed for use in CMTs, and could not used [sic], absent alteration, in a non-CMT device. The Department selected the five dollar value for defining the scope since this is a value that it has determined is equivalent to a 'major' subassembly. The Department feels that a dollar cut-off point is a more workable standard than a subjective determination such as whether a circuit module is 'substantially complete.' Examples of subas-

> semblies which may fall within this definition are circuit modules containing any of the following circuitry or combinations thereof: audio processing, signal processing (logic), RF, IF, synthesizer, duplexer, power supply, power amplification, transmitter, and exciter. The presumption is that CMT subassemblies are covered by the order unless an importer can prove otherwise. An importer will have to file a declaration with the Customs Service to the effect that a particular CMT subassembly is not dedicated exclusively for use in CMTs or that the dollar value is less than $5, if he wishes it to be excluded from the order.

AD Final Determination, 50 Fed. Reg. at 45,448 (1985).

The Court finds the ITA's decision to include the discrete subassemblies by its definition was not an abuse of its authority in protecting domestic producers against imported merchandise which was "being, or [was] likely to be sold in the United States at less than its fair value * * *." 19 U.S.C. § 1673(1). The scope of the investigation was not overreaching or broad, but was reasonably designed to effectuate the administration of the antidumping law.

Plaintiffs argue that the five dollars or more value attached to what constitutes a major subassembly is arbitrary and that a more reasonable standard should be one where major assemblies be judged upon their use in final assembly of CMTs.

The ITA is operating under its recognized discretion in adopting what it determines to be a reasonably derived standard in what constitutes a major and a minor subassembly. The ITA stated its predominate concern was to prevent circumvention of any antidumping order on CMTs through tactical and diverse methods of importation, some of which were discussed in the ITA's final determination, and some of which were discussed in the petition. It is not hard to conceive of the diverse and sundry ways in which dumped subassembly merchandise may enter the U.S. through various channels and means and become assembled to constitute an item from which the domestic market is suffering injury. Indeed, this Court has observed in regard to an antidumping investigation of color T.V. receivers:

> Ample evidence was developed during the course of the proceedings which supports the conclusion that Commerce contemplated assembly of PCBs and CPTs into CTVs within the United States.
>
> * * * * * * *
>
> Plaintiffs cannot avoid the imposition of antidumping duties merely by bifurcating their shipments. The Court will not allow such a transgression upon the antidumping duty laws of this country. The object of the dumping laws is to protect domestic producers against imported merchandise which 'is being, or is likely to be, sold in the United States at less than its fair value * * *.' 19 U.S.C. § 1673(1) (1982). The present merchandise is

> sold on the U.S. market not as a PCB nor as a CPT, but as a color television receiver; the object of the original antidumping duty order. If the Court were to allow separate importations of PCBs and CPTs (subsequently assembled together) to escape the purview of the CTV Order, the domestic industry would continue to suffer the injurious consequences of dumped goods.

Gold Star Co., Ltd. v. *United States,* —— CIT ——, ——, Slip Op. 88–102 at 7–9 (July 29, 1988) (footnote and emphasis omitted), *appeal docketed* No. 88—— (Fed. Cir. Sept. 27, 1988).

The ITA may exercise its discretion to select a particular methodology and as long as substantial evidence on the record supports that choice, the Court reviewing such methodology will sustain the ITA's decision. This holds true when a respondent disagrees with the ITA's methodology and urges the use of an alternate method for defining the scope of an investigation. *See, Hercules, Inc.* v. *United States,* —— CIT ——, ——, 673 F. Supp. 454, 469 (1987). The Court also recognizes it "may not substitute its judgment for that of [the ITA] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.' " *Penntech Papers, Inc.* v. *NLRB,* 706 F.2d 18, 22 (1st Cir. 1983), *cert. denied,* 464 U.S. 892, 104 S.Ct. 237, 78 L.Ed.2d 228 (1983) (quoting *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, 464, 95 L.Ed. 456, 467–8 (1951)).

In the investigation, the attention of the ITA was attuned to any type of evasion of an antidumping order whether the subassemblies varied in size, type, value, or method of importation. The ITA recognized subassemblies imported in the form of kits, collections, or separates, dedicated exclusively for use in CMTs, although not constituting a "major" portion of the value or constituent part of a completed CMT, nevertheless could be quickly and easily assembled together and become a completed CMT. More importantly, the ITA determined the subassemblies and discrete subassemblies were "the class or kind of merchandise described in this petition," which determination has been sustained by the Court. While some of the subassembly components under investigation may be proportionately less in value or size than other subassembly components, the ITA decision to include those subassemblies and discrete subassemblies in the investigation was supported by substantial evidence on the record and otherwise in accordance with law.

Concerning plaintiff's complaint the ITA's inclusion of subassembly parts interfered with foreign-owned U.S. producers' purchasing of subassemblies from abroad, defendant rightly recognizes the ITA's administration of the antidumping law is not to be concerned with effects on U.S. purchasers, but to investigate and impose duties where illegal dumping occurs. This action of imposing duties on dumped goods will necessarily affect the interests of purchasers of

these goods, whether they be domestic consumers, foreign-owned production operations, or U.S. owned operations.

Concerning plaintiffs' fear of its hypothetical scenario, that the ITA's broad scope of investigation would include all subassemblies, whether sold to a supplier unrelated to the foreign producers of CMTs, or to a purchaser for use in other products; the Court finds the ITA's scope of restriction limited to "dedicated exclusively for use" in CMTs provides protection from inclusion in the order of CMT subassemblies sold to purchasers using the subassembly in non-CMT devices. *See* 50 Fed. Reg. at 45,448. The Court also notes the ITA listed other products excluded from the investigation and antidumping order. *See id.* Adequate protection was also given to those importers whose merchandise did not fall within the antidumping order by allowing those parties to file declarations to the Customs Service to be excluded from the order. Plaintiffs' hypothetical situations are just that, hypothetical, and no evidence existed to show the ITA's determination caused such exaggerated results.

Plaintiffs raise additional challenges to the ITA's determinations claiming neither the petition, nor the record contained sufficient allegations or evidence of sales of discrete CMT subassemblies at less than fair value to justify their inclusion in the ITA's investigation and order. Plaintiffs reiterate their argument that discrete CMT subassemblies were not the same class or kind of merchandise as was described in the petition and therefore information given and collected on sales of CMTs hardly substitutes for the lack of information given to and collected by the ITA on sales of discrete CMT subassemblies. Plaintiffs charge the ITA failed to investigate discrete CMT subassemblies contrary to 19 U.S.C. § 1673.

Section 1673 requires the ITA to impose duties upon foreign merchandise if the ITA determines that a class or kind of that foreign merchandise is being sold or likely to be sold in the United States at less than fair value. This is contingent, of course, upon an injury determination by the ITC. The Court has held, above, Motorola's petition did allege the elements necessary for the ITA to determine the scope of the investigation included CMTs and CMT subassemblies, both determined to be the same class or kind of merchandise to be investigated. Discrete CMT subassemblies also properly fell within this scope of investigation.

Accordingly, the petitioner did not need to provide inclusive information covering all the categories and subcategories of all those goods included as like *class* or *kind* of merchandise to be investigated. Petitioner alleged sufficient information and description for the ITA to reasonably set forth the scope of investigation. The fact that petitioner Motorola did not submit information covering every single item that was of the same kind or class of merchandise to be investigated does not, in itself, preclude the ITA from considering those goods in the scope of investigation. This fact also does not invalidate Motorola's petition from inherently including those items

under the purview of the petition and investigation. Because the discrete CMT subassemblies have been found to be of the same class or kind of merchandise as CMTs, plaintiffs' argument that no substantial evidence on the record supports the inclusion of discrete CMT subassemblies in the scope of the ITA's investigation, final determination or order, fail.

This Court has recognized, in *Royal Business Machines* v. *United States,* 1 CIT 80, 507 F. Supp. 1007 (1980), *aff'd,* 69 CCPA 61, 669 F.2d 692 (1982), the following:

> Each stage of the statutory proceeding maintains the scope passed on from the previous stage. Thus, the class or kind of merchandise described in the petition, which becomes the subject of investigation under 19 U.S.C. 1673a(c)(2), is the subject of the preliminary injury determination of 19 U.S.C. 1673b, the suspension of liquidation under 19 U.S.C. 1673b(d), the possible terminations or suspensions of 19 U.S.C. 1673c, and the final determinations of 19 U.S.C. 1673d.
>
> In those administrative proceedings even if plaintiff believed itself to be an 'orange' among 'apples', so long as the Department of Commerce and the ITC were considering it to belong to a certain class it remained so for the purpose of the proceedings.

1 CIT at 87, 507 F. Supp. at 1014. Accordingly, the ITA's inclusion of discrete CMT subassemblies in the scope of the investigation, determination, and order was supported by substantial evidence on the record and otherwise in accordance with law.

Plaintiff Mitsubishi raises a distinct challenge to the ITA's determination, arguing the ITA's treatment of the issuance of certain purchase orders as sales was not in accordance with law or supported by substantial evidence on the record. Mitsubishi contents the ITA erred by rejecting third country sales data as the basis for calculating foreign market value in favor of using three purchase orders issued by a Nippon Telephone and Telegraph Company (NTT) subsidiary to Mitsubishi during the investigation period. Mitsubishi argues the purchase orders did not constitute "sales" because the merchandise covered by the purchase orders was actually delivered after the close of the investigation period.

Defendant and defendant-intervenor both counter these arguments by pointing out the purchase orders were neither offers nor agreements to sell, but actual sales. The purchase orders, contends defendant and defendant-intervenor, contained the essential terms of the sale: quantity, price, and date of delivery. Subsequently, after the period of investigation, the purchase orders were filled according to the terms, contends defendant. Defendant-intervenor concludes that the consummation of the sale did not depend on the delivery time because the purchase orders themselves constituted the sale.

The ITA is directed by Congress to determine foreign market value pursuant to 19 U.S.C. § 1677b. Pursuant to the criteria set forth in § 1677b,[5] the ITA must first rely on home market sales unless, *inter alia,* the merchandise is not sold or offered for sale for home consumption or the sales are so small as to form an inadequate basis for comparison, then the ITA should consider third-country sales.

When foreign market value is based upon sales in the home market or to third countries, it shall be the price at which the merchandise is sold, or, if no sales occur, the price at which it is offered for sale at the time such merchandise is sold to unrelated parties in the U.S.

United States price is described in 19 U.S.C. § 1677a as the following:

> (a) **United States Price**—For purposes of this subtitle, the term 'United States price' means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> (b) **Purchase Price**—For purposes of this section, the term 'purchase price' means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States. Appropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.
>
> (c) **Exporter's Sales Price**—For purposes of this section, the term 'exporter's sales price' means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter, as adjusted under subsections (d) and (e) of this section.

19 U.S.C. § 1677a (1985).

Although the ITA has authority to use purchase and sales agreements in determining the United States price, neither the statutes

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[5]Section 1677b provides in pertinent part:

> (1) In general—The foreign market value of imported merchandise shall be the price, at the time such merchandise is first *sold* within the United States by the person for whom (or for whose account) the merchandise is imported to any other who is not described in subsection (e)(3) of this section with respect to such person—
>
> > (A) at which such or similar merchandise is *sold or, in the absence of sales, offered for sale* in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption, or
> >
> > (B) if not so *sold or offered for sale* for home consumption, or if the administering authority determines that the quantity *sold* for home consumption is so small in relation to the quantity sold for exportation to countries other than the United States as to form an inadequate basis for comparison, then the price at which so *sold or offered for sale* for exportation to countries other than the United States,
>
> increased by, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise *purchased or agreed to be purchased* by the person by whom or for whose account the merchandise is imported, prior to the time of importation, the foreign market value shall be ascertained as of the date of such *purchase or agreement to purchase.* In the ascertainment of foreign market value for the purposes of this subtitle no pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account.

19 U.S.C. § 1677b (1985) (emphasis added).

nor the regulations define the term "sale" in the context of at what time or date a sale has been consummated. 19 U.S.C. § 1677(14) does provide for the following explanation on the meaning of "sold or, in the absence of sales, offered for sale" as follows:

> The term 'sold or, in the absence of sales, offered for sale' means sold or, in the absence of sales, offered—
>
> (A) to all purchasers in commercial quantities, or
> (B) in the ordinary course of trade to one or more selected purchasers in commercial quantities at a price which fairly reflects the market value of the merchandise,
>
> without regard to restrictions as to the disposition or use of the merchandise by the purchaser except that, where such restrictions are found to affect the market value of the merchandise, adjustment shall be made therefor in calculating the price at which the merchandise is sold or offered for sale.

19 U.S.C. § 1677(14) (1985).

Although Mitsubishi argues the statutes do not give the ITA discretion to treat offers to buy as sales, it is clear the offers to buy constituted more than just an offer to buy. The Court has found that a sale can occur when an order is placed and when the basic contract terms, including price, are set. *See, Atlantic Steel Co.* v. *United States,* —— CIT ——, ——, 636 F. Supp. 917, 920 (1986).

During the instant investigation the ITA sent questionnaires to Mitsubishi requesting information regarding sales in the home market. The request set out "date of sale" as that "point in the transaction where all the terms are finally determined." Rec. Doc. 71–76 at 1. The ITA has also followed this rationale in *Certain Iron Construction Castings From Brazil,* 51 Fed. Reg. 9,477, 9,481 (1986); and *64k DRAM's From Japan,* 51 Fed. Reg. 15,943, 15,946–47 (1986). In the *64K DRAM* investigation, the ITA had determined that for the merchandise involved, the purchase orders were not intended to be binding. In contrast, the instant action contains evidence that the intent of the parties to the purchase orders did intend to consummate the deal at the set terms and did in fact do so. It should also be noted that the ITA has referred to agreements to sell as a basis for foreign market value. *See, e.g., Sugar and Syrups from Canada,* 44 Fed. Reg. 64,946 (1979).

The ITA's determination that the three purchase orders constituted actual sales is supported by substantial evidence on the record. The three purchase orders had been verified by the ITA as filled orders, even absent confirmation of delivery. The terms of the orders constituted set terms of a sale: quantity, price, and date of delivery. Production orders issued by Mitsubishi demonstrated the company was fulfilling the purchase order agreement arrangements concerning the merchandise. The Court holds that the ITA's disregard of the self-serving *ex post facto* letter, by the Mitsubishi official, concerning the relationship between the company and its customer, was within the agency's discretion. The letter was offered af-

ter the close of verification. The agency was able to gather verified evidence that supported its determination.

Further, Mitsubishi failed to report these purchase orders in response to the questionnaire as related to any information concerning sales. The ITA was obliged pursuant to 19 U.S.C. § 1677e(b) to use the best information otherwise available, which was the sales information concerning the purchase orders. *See, Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 744 F.2d 1556 (1984).

Accordingly, the ITA's use of the purchase orders as sales and using the date of the purchase orders as the "date of sale" was in accordance with law and was substantiated by evidence on the record.

Concerning the challenge to the ITC's injury determination, the Court shares some of the same concerns plaintiffs have in regard to the thoroughness of the ITC's investigation of specific information relating to a stage of production using subassemblies to produce complete CMTs. Plaintiffs argue the ITC failed to seek or request available subassembly-specific information from the domestic industries, thereby "boot-strapping" its decision to invoke a "products lines" analysis pursuant to 19 U.S.C. § 1677(4)(D), by relying on data concerning finished CMT information as the best and only information available.

Defendant counters these arguments in its brief as follows:

> In this investigation, the information of record made it clear that virtually all subassemblies are manufactured by producers of CMT's [sic] and CMT transceivers and control units for captive use in their production of the finished goods * * *. There is no independent market for, or producer of, subassemblies. Consequently, the Commission acted reasonably in not seeking specific information relating to an intermediate stage of the production of a finished good.
>
> Indeed, such information would of necessity represent allocations of profits to an intermediate good, or merely reflect the internal transfer pricing policies of domestic manufacturers of CMT's [sic] and CMT transceivers and control units. It would not be reasonable to assess the condition of the domestic industries on the basis of artificial or unreliable information of this nature.

Defendant's Memorandum in Response to Plaintiffs' Motions for Judgment Upon the Agency Record, Part II at 12. *Mitsubishi Electric Corp* v. *United States,* Consol. Court No. 85–12–01858 (Defendant's Memo II). It appears that the ITC's questionnaire sent to the domestic CMT producers requested that replies to the domestic industry responses should: "report data separately for subassemblies ONLY IF SUCH SUBASSEMBLIES ARE SOLD TO UNRELATED PURCHASERS AS SEPARATE UNITS (i.e., if all of your firm's production of subassemblies is used internally to produce transceivers and/or control units, do not separately report data on such sub-

assemblies)." ITC Rec. 41 (confidential), Questionnaire at 3 (emphasis in original).

Section 1673 of the antidumping law requires the imposition of duties when, *inter alia*, the ITC "determines that an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of * * *" LTFV imports. 19 U.S.C. § 1673 (1985). Section 1677(4)(A) defines a United States industry as, *inter alia*, "the domestic producers as a whole of a like product * * *." 19 U.S.C. § 1677(4)(A) (1985). Section 1677(10) follows with the definition of a "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation * * *." 19 U.S.C. § 1677(10) (1985). It was at this point that the present issue arises.

The ITC, in its injury determination, found that the CMT subassemblies under investigation are separate "like" products as compared to complete CMTs. *Cellular Mobile Telephones and Subassemblies Thereof From Japan*, USITC Pub. No. 1786 at 6–7 (1985). The ITC, also in the determination, stated the following: "Available data on the condition of these domestic industries exist only at the level of complete CMTs. Thus, we have applied [§ 1677(4)(D)] and assessed the condition of these industries in terms of data on complete CMTs." *Id.* at 11–12.

Section 1677(4)(D) provides:

> (D) **Product lines.**—The effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product *if available data permit* the separate identification of production in terms of *such criteria as* the *production process* or the producer's profits. If the domestic production of the like product has no separate identity in terms of such criteria, then the effect of the subsidized or dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes a like product, for which the necessary information can be provided.

19 U.S.C. § 1677(4)(D) (1985) (emphasis added).

Defendant claims the ITC applied the second half of § 1677(4)(D), called the "product lines" proviso, because there was a "lack of specific information relating to production of [the] subassemblies." Defendant's Memo II at 10–11. The ITC's utilization of the "product line" proviso, defendant argues, gave the ITC authority to analyze "the condition of [the domestic subassembly] industries using the best information available, [which was] data concerning complete CMT's [sic] and CMT transceivers and control units * * *." *Id.*

The Court recognizes that § 1677(4)(D) gives the ITC authority to invoke the "product lines" proviso only if the ITC adheres to the first portion of § 1677(4)(D). The ITC *shall* assess the effect of dumped imports on the U.S. production of like products *if available*

data permits the *separate* identification of *production* in terms of such criteria as *production process* or producer's profits. *Id.*

In the present case, the ITC precluded itself from receiving *available* data permitting separate identification of production of subassemblies. The ITC chose not to seek this information from the domestic industry as it concerned subassemblies sold to related purchasers. As defendant explains, the ITC *assumed* such information, no matter how available, was irrelevant and unreliable and should not have merited an attempt to obtain and consider. Defendant's Memo II at 12. When challenged on the thoroughness of the investigation, defendant replied "it appears that there is no *standard* of investigative thoroughness which the [ITC] must meet in any investigation beyond the standards for review of [ITC] determinations * * *." *Id.* at 14–15. Using this rationale, it could be argued that the ITC is free to request only that information which will bolster its assumed conclusions and preclude any other available information whether contrary or not. Thus, in these circumstances, the ITC would be able to shape the record with only that information which would certainly constitute substantial evidence on the record. Such actions would certainly be found to be arbitrary and contrary to law.

The Court also recognizes that using the best information available rests on the presumption that reasonably available information will be sought, collected, and considered before determining what is the best available information to use. Here, the ITC has defined what is the best information available before requesting available information, and then has couched its language in the questionnaire to request only that predetermined data. Such examples of predestination are not for the ITC to establish and control.

The lack of availability of information concerning subassembly production was never addressed by defendant, except to the extent that such information, whether available or not, was not worthy of consideration on the premise that CMT data was more trustworthy. The Court observes that better effort must be undertaken to request available information that is, on its face, relevant to separately identifying production.

The Court is not in a position to determine what information is available to permit separate identification of production, but to review those type of decisions left to the discretion of the ITC. However, where the ITC actively precludes itself from receiving relevant data or takes no effort to seek relevant data contrary to § 1677(4)(D), which directs the ITC *shall* assess domestic production where available data exists and where that data is reasonably available for the ITC to collect and consider, then such actions will be

found to be contrary to law. *See Babcock & Wilcox Co.* v. *United States,* 2 CIT 74, 521 F. Supp. 479 (1981), *vacated,* 4 CIT 3 (1982).[6]

This Court has also had opportunity to expound on the ITC's responsibility of investigation under § 1677(4)(D). The court, in *Kenda Rubber Indus. Co., Ltd.* v. *United States,* —— CIT ——, 630 F. Supp. 354 (1986) observed:

> This Court had occasion to examine this passage of the Senate Report in *Roquette Freres* v. *United States,* 7 CIT 88, 583 F. Supp. 599 (1984). After quoting this passage the Court stated, 'It is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors *necessary for its analysis.'* 583 F.Supp. at 604 (emphasis added). Congress did not intend to require the Commission to obtain separate data on every enumerated economic factor; rather, it directed the Commission to obtain such data, where possible, as allows it to make a 'reasonably separate consideration.'

Kenda Rubber, —— CIT at ——, 630 F.Supp., at 357–58.

The Court recognizes had the ITC requested and considered this reasonably available data and then, under its statutory discretion, found such information irrelevant or unreliable, then evidence on the record would exist in order for the Court to properly review the determination. The best information available could have also been considered by the ITC had the responding parties been uncooperative or unable to produce requested information. *See* 19 U.S.C. § 1677e(b). But here, the information, while reasonably available, was not requested.

Accordingly, the Court holds the ITC's failure to seek reasonably available data concerning subassembly production (*i.e.,* available data permitting the separate identification of production) was contrary to law and did establish a lack of thoroughness in its investigative duties where § 1677(4)(D) is concerned.

Conclusion

For the reasons stated above, the Court holds it was contrary to law for the ITC to fail to request and examine data reasonably available concerning domestic production of subassemblies pursuant to the "product lines" proviso of 19 U.S.C. § 1677(4)(D), and remands this case to the ITC for further proceedings in accordance with this opinion. The Court upholds the ITA's inclusion of discrete CMT subassemblies within the scope of its investigation, the final affirmative LTFV antidumping duty order and the final antidump-

[6] In considering the ITC's disregard of submitted data, which the ITC itself considered self-serving, it has been observed by this Court:

> the self-serving nature of the data should not be defeating, given the Commission's investigatory function to verify data received. Congress anticipated that petitioners in antidumping proceedings would have a stake or interest in developing the relevant facts supporting a dumping finding. Not only should the Commission have considered plaintiff's profit data in connection with its determination as to the scope of the 'industry', it should have sought such data from the other domestic producers comprising the boiler tube and pipe industry before moving to the broader industry which even the Commission's own staff acknowledges to have been a mistake.

Babcock & Wilcox, 2 CIT at 80, 521 F. Supp. at 485.

ing order. Additionally, the Court holds the ITA's treatment of purchase orders as sales for the calculation of foreign market value for Mitsubishi's merchandise and the ITA's determination that imported discrete CMT subassemblies were sold at less than fair value, are supported by substantial evidence on the record and otherwise in accordance with law.

(Slip Op. 88–153)

RSI (INDIA) PVT., LTD., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND PINKERTON FOUNDRY, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 87–01–00086

Before DICARLO, *Judge.*

Foreign manufacturers who elect not join in an appeal from a final decision of this Court are not entitled to an injunction against liquidation pending appeal.

[Plaintiffs' motion for an injunction pending appeal is granted in part and denied in part.]

(Decided November 3, 1988)

Brownstein, Zeidman & Schomer (Irwin P. Altschuler, David R. Amerine, and *Ronald M. Wisla*), and *Kaplan, Russin & Vecchi* (*Dennis James, Jr.*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, United States Department of Justice (*Elizabeth C. Seastrum*); United States Department of Commerce (*Mark J. Sadoff*) for defendant.

Collier, Shannon, Rill & Scott (*Paul C. Rosenthal* and *Carol A. Mitchell*) for defendant-intervenors.

DICARLO, *Judge:* RSI (India) Pvt., Ltd. ("RSI"), which is an Indian manufacturer and exporter of iron metal casting products, and South Bay Foundry, Creswell Trading Company, and City Pipe Company (the "importers"), which are United States importers of iron metal casting products from India, move pursuant to Rule 62(c) of the Rules of this Court for an order to "restore" an injunction pending appeal. The Court grants an injunction pending appeal as to those 1984 entries of iron metal castings from India which RSI produced or exported and as to entries of the three named importers, but denies the injunction as to those plaintiffs who are not parties to the appeal.

BACKGROUND

On January 20, 1987, this Court, on plaintiffs' motion, entered a preliminary injunction enjoining liquidation of all entries of iron metal castings exported from India and covered by the final results of a third administrative review of a countervailing duty order on these castings. *Certain Iron-Metal Construction Castings From In-*

dia; Final Results of Countervailing Duty Administrative Review, 51 Fed. Reg. 45,788 (Dec. 22, 1986).

In November of 1987 the defendant-intervenors moved to dismiss the importers from this action on the basis that the importers had not been "parties to the proceeding" as defined in 19 C.F.R. § 353.12(i)(4) (1987) and as required by 19 U.S.C. § 1516a(d) (1982). This Court found that the importers were "parties to the proceeding" and had standing to challenge the final determination of the International Trade Administration of the United States Department of Commerce ("Commerce"). *RSI (India) Pvt., Ltd.* v. *United States,* 12 CIT ——, 678 F. Supp. 304 (1988). Following a partial remand to Commerce, the Court affirmed the final determination and dismissed the action. *RSI (India) Pvt., Ltd.* v. *United States,* 12 CIT ——, 687 F. Supp. 605 (1988), *reh'g denied,* 12 CIT ——, 688 F. Supp. 646 (1988), *aff'd following remand to Commerce,* 12 CIT ——, Slip Op. 88–110 (Aug. 22, 1988).

Pursuant to Rule 62(a) of the Rules of this Court, the preliminary injunction which had been entered dissolved automatically on September 21, 1988. Two days later Commerce published an amendment to its final results and gave notice that it would instruct the Customs Service to assess countervailing duties of 7.31 percent of the f.o.b. invoice price on all shipments exported in 1984. *Certain Iron-Metal Construction Castings from India; Amendment to Final Results of Countervailing Duty Administrative Review in Accordance with Decision upon Remand,* 53 Fed. Reg. 37,014 (Sept. 23, 1988).

The plaintiffs filed a notice of appeal with this Court on October 19, 1988, and moved to "restore" the injunction that was in effect from January 20, 1987 to September 21, 1988.

After a telephone conference on October 25, 1988, Judge Jane Restani, sitting as motion part judge, entered a temporary restraining order to enjoin liquidation of iron metal castings (1) produced or exported by RSI and (2) imported by South Bay Foundry, Creswell Trading Company, and City Pipe Company.

Discussion

Plaintiffs have styled their motion as a motion to "restore" the injunction granted pending appeal. They thus seek an injunction to cover *all* of the subject castings entered or withdrawn from a warehouse during the period of Commerce's third administrative review, January 1, 1984 to December 31, 1984.

The government states that because the Court has never granted an injunction pending appeal in this action, the Court should treat plaintiffs' motion to restore the preliminary injunction as a motion for an injunction pending appeal. Although the government notes that plaintiffs have filed an improper motion, the court has "restored" a preliminary injunction pending appeal in *Brother Indus., Ltd.* v. *United States,* 3 CIT 242 (1982). In a more recent case, how-

ever, the court found a difference where an applicant sought an "injunction pending appeal, rather than a preliminary injunction." *Algoma Steel Corp.* v. *United States,* 12 CIT ——, Slip Op. 88–118, at 10 (Sept. 6, 1988).

Since a preliminary injunction is interlocutory in nature, it cannot survive a final order of dismissal. *Cypress Barn, Inc.* v. *Western Elec. Co.,* 812 F.2d 1363, 1364 (11th Cir. 1987). The Court thus treats plaintiffs' motion to restore the preliminary injunction as a motion for an injunction pending appeal pursuant to Rule 62(c) of the Rules of this Court. Rule 8(a) of the Federal Rules of Appellate Procedure provides that plaintiffs may properly seek an injunction pending appeal in this Court in the first instance, rather than in the United States Court of Appeals for the Federal Circuit.

In granting an injunction pending appeal, the court considers: (1) a threat of irreparable harm; (2) a likelihood of success on appeal; (3) whether the injunction will substantially injure other parties in the proceeding; and (4) where the public interest lies. *See Hilton* v. *Braunskill,* 107 S. Ct. 2113, 2119 (1987); *Zenith Radio Corp.* v. *United States,* 1 Fed. Cir. (T) 74, 710 F.2d 806 (1983); *S.J. Stile Assocs. Ltd.* v. *Snyder,* 68 CCPA 27, C.A.D. 1261, 646 F.2d 522 (1981). An injunction pending appeal, however, is a not a matter of right, even if irreparable injury might otherwise result to the appellant. Rather, it is an exercise of judicial discretion and the propriety of issuing an injunction pending appeal depends on the circumstances of each case. *See Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n,* 316 U.S. 4, 10 (1942).

1. *RSI*

The government recognizes that injunctive relief is appropriate when a party's statutory right to obtain judicial review of a challenged determination would otherwise be rendered meaningless and when the party participated fully in the administrative proceeding. The government thus consents to an injunction pending appeal for the products of RSI.

Defendant-intervenors, Pinkerton Foundry Inc., Alhambra Foundry Co., Allegheny Foundry Co., Campbell Foundry Co., Deeter Foundry Co., East Jordan Iron Works Inc., LeBaron Foundry Inc., Municipal Castings, Inc., Neenah Foundry Co., U.S. Foundry and Manufacturing Corp., and Vulcan Foundry Inc., (the "domestic industry"), oppose any injunction pending appeal on the basis that plaintiffs have not satisfied the criteria for granting an injunction.

Plaintiffs state that they do satisfy the criteria for an injunction. First, Commerce has instructed the Customs Service to liquidate the contested 1984 entries of iron metal castings from India and assess countervailing duties in the amount of 7.31 percent *ad valorem.* If the entries are liquidated, plaintiffs would be deprived of their right of judicial review and denied the opportunity to obtain the ultimate relief that they seek—a remand to Commerce with instruc-

tions to recalculate the countervailing duty assessments and deposit rates in accordance with instructions from the Court of Appeals for the Federal Circuit.

Second, plaintiffs state that they have raised sufficiently substantial questions concerning Commerce's treatment of rebates under the Indian Price Reimbursement Scheme to warrant consideration by the appellate court. *See Timken Co.* v. *United States*, 6 CIT 76, 80, 569 F. Supp. 65, 70 (1983).

Third, plaintiffs state that a balancing of hardships confirms the necessity of an injunction pending appeal. While plaintiffs face irreparable injury if the requested relief is not granted, the defendant will not suffer any perceivable hardship because the liquidations will remain suspended during the pendency of the litigation. Maintaining the *status quo* will not affect the government's position, nor will the United States lose any revenue as deposits on these entries have already been made. At the conclusion of the appellate litigation, the subject entries will be liquidated at their proper rate.

Fourth, the public interest will be served by preserving jurisdiction over the contested entries during judicial review of Commerce's application of the unfair trade laws. *See Zenith Radio Corp.* v. *United States*, 1 Fed. Cir. (T) 74, 710 F.2d 806 (1983).

The Court finds that the plaintiffs have satisfied the four criteria for an injunction pending appeal as to RSI, and that accordingly an injunction against liquidation should issue as to merchandise produced or exported by RSI. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 316 U.S. 4, 10 (1942).

2. *Importers*

The government does not consent to an injunction for "the importers, all of whom lack standing." The government argues that the importers lack standing to pursue the appeal because they were not "parties to the proceeding" at the administrative level. *Defendant's Partial Opposition to Plaintiffs' Motion to Restore Injunction Pending Appeal*, at 4–5.

The government's argument contravenes the Court's findings in *RSI (India) Pvt., Ltd.* v. *United States*, 12 CIT ——, 678 F. Supp. 304, 306–07 (1988). That decision found that Commerce received written comments from the importers one month before it published the results of its administrative review, and held that this was sufficient to establish that the importers were "parties to the proceeding" because Commerce stated in its administrative review results that it considered "*all* of the comments received." *Id.* at ——, 678 F. Supp. at 307.

The Court adheres to its holding in *RSI (India) Pvt., Ltd.* v. *United States*, 12 CIT ——, 678 F. Supp. 304, 306–07 (1988), and again

finds that the three importers were parties to the proceeding. Applying the four factors stated in granting the motion for RSI, the Court finds that plaintiffs have satisfied the criteria for an injunction pending appeal for merchandise that was imported by South Bay Foundry, Creswell Trading Co., or City Pipe Co.

3. *Other Indian Manufacturers*

The government does not consent to an injunction for the products of producers who have not joined in the appeal.

Only four of the original plaintiffs, RSI and the importers, were named as appellants in the notice of appeal filed on October 19, 1988. The notice of appeal does not name any of the other Indian exporters, Kajaria Castings Pvt., Ltd., Kejriwal Iron and Steel Works, Serampore Industries Pvt., Ltd., Uma Iron & Steel Co., Commex Corp., Govind Steel Co., Ltd., East Coast Manufacturing, nor does it name the Engineering Export Promotion Council of India.

An affidavit filed on November 2, 1988 explains that not all the Indian manufacturers are named in the appeal because "they were unable to bear the additional expense of further litigation." *Affidavit of Dennis James, Jr.*, at 3, para. 6. The affidavit nonetheless argues that because Commerce's amended determination is subject to appeal, "justice would be best served by having *all* countervailing duty assessments made in accordance with the determination of the appellate court." *Id.* at 4, para. 9.

Contrary to the assertion that justice would be served by entering an injunction even as to the non-appealing parties, there is "no general equitable doctrine * * * which countenances an exception to the finality of a party's failure to appeal merely because his rights are 'closely interwoven' with those of another party," *Federated Dep't Stores* v. *Moitie,* 452 U.S. 394, 400 (1981).

The Court finds that an injunction should not issue as to the merchandise exported by Indian producers who have not joined in the appeal. They have weighed the cost of further litigation and accepted the final decision of this Court.

Conclusion

The Court enters an injunction pending appeal to cover the entries of iron-metal castings imported by South Bay Foundry, Creswell Trading Co., or City Pipe Co., and those entries produced or exported by RSI (India) Pvt., Ltd. The Court finds an injunction should not issue as to those Indian manufacturers who have not joined in the appeal to the United States Court of Appeals for the Federal Circuit.

(Slip Op. 88–154)

ARIS ISOTONER GLOVES, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–06–00866

MEMORANDUM & ORDER

[On cross-motions for summary judgment as to value of imported dress gloves, parties directed to confer and report on the items used in production of the merchandise.]

(Dated November 7, 1988)

Donohue and Donohue (*James A. Geraghty* and *Joseph F. Donohue*) for the plaintiff.

John R. Bolton, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*Saul Davis*) for the defendant.

AQUILINO, *Judge:* This action challenges the value of imported dress gloves computed pursuant to section 201 of the Trade Agreements Act of 1979, 19 U.S.C. § 1401a.

The underlying facts are not in dispute. They indicate that the plaintiff New York importer furnished free of charge its wholly-owned affiliate in the Republic of the Philippines with equipment, machinery, tools, dies, and spare parts which were then used in the production of the merchandise. The total cost or value of the equipment and machinery is said to be $421,207.81, with the value of the tools, dies, and spare parts set at $89,497.42. The equipment and machinery were capitalized and carried on plaintiff's books based on an estimated useful life of eight years and depreciated on a straight line basis. The other items were expensed in one fiscal yer.

For "mutual convenience", the contested duties were computed in the following manner, as described by plaintiff's controller in his affidavid:

> 5. Because it has been the position of Customs Headquarters that the involved machinery and equipment were dutiable assists, Aris Isotoner Gloves, Inc. tendered duty to cover the value of the machinery and equipment as well as the dies, tools and spare parts utilized by Aris (Philippines), Inc. during 1981 by allocating the value thereof to a single representative Customs entry as follows. The total FOB value of Aris merchandise imported from the Philippines during fiscal year 1981 was divided into the total duty deposited which was based on the various applicable rates of duty depending on the involved tariff classification and relative volume by value of each product category. The result was the average duty rate of 21.07%. Therefore, the duty attributable to the involved "assists" was $107,605.54 ($510,705 × 2107 [*sic*]). To facilitate payment, the value of the assists was added to JFK Airport entry number 82–343317–1 of November 20, 1981. Since none of the merchandise enumerated

> on that entry was dutiable at exactly 21.07%, the declared value of the assists was adjusted to correpond [*sic*] to the rate applicable to a portion of the merchandise covered by the entry, to wit: Embroidered nylon gloves classifiable under item 704.32 TSUS at 30%. Therefore, the declared value of the assists was $358,685.20, at 30% which equals $107,605.56. The entry was annotated to show that assists were "added to meet market value", and explanatory correspondence accompanied the entry.

After payment of those duties, the importer filed a protest. It was denied, whereupon this action was commenced, seeking judicial interpretation of section 201(a) of the Trade Agreements Act. In particular, subsection (e) states, in part:

> (1) The computed value of imported merchandise is the sum of—
>
> (A) the cost or value of the materials and the fabrication and other processing of any kind employed in the production of the imported merchandise;
>
> (B) an amount for profit and general expenses equal to that usually reflected in sales of merchandise of the same class or kind as the imported merchandise that are made by the producers in the country of exportation for export to the United States;
>
> (C) any assist, if its value is not included under subparagraph (A) or (B); and
>
> (D) the packing costs.

19 U.S.C. § 1401a(e)(1). Subsection (h), 19 U.S.C. § 1401a(h) (1) (A), defines the term "assist" to mean

> any of the following if supplied directly or indirectly, and free of charge or at reduced cost, by the buyer of imported merchandise for use in connection with the production or the sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dies, molds, and similar items used in the production of the imported merchandise.
>
> (iii) Merchandise consumed in the production of the imported merchandise.
>
> (iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise.

Discussion

In *Texas Apparel Co.* v. *United States*, 12 CIT ——, Slip Op. 88–148 (Oct. 25, 1988), the plaintiff challenged the Customs Ser-

vice's inclusion of the cost or value of sewing machines, repair parts and of repairs in computing the value of certain wearing apparel imported from Mexico. That is, the plaintiff contended that the sewing machines were "general purpose equipment" and not "tools, dies, molds, and similar items used in the production of the imported merchandise" within the meaning of the foregoing statute.

In holding for the defendant, the court stated that the legislative history of the Trade Agreements Act "reveals that Congress did not intend as narrow or restrictive a view of computed value, or of the term 'assist,' as suggested by plaintiff";[1] that the Customs Service's interpretation of the term "as including items directly related to the production of merchandise, such as a sewing machine to the sewing of wearing apparel, cannot be said to be contrary to the goals and intent of the new valuation code";[2] and that, since the sewing machines at issue "are used directly 'in the production of the imported merchandise' * * *, Customs' interpretation * * * is reasonable and consistent with congressional intent." Slip Op. 88–148, at 12. Rejecting the plaintiff's *ejusdem generis* argument, the court found that

> the function performed by the sewing machines, which is to construct the apparel by sewing together the fabric, is essentially or principally the same as that of a tool, die, or mold. Although a tool may be defined as * * * a manual instrument, a tool may also be defined more broadly as "an implement or object used in performing an operation or carrying on work of any kind * * *" *See Websters Third New International Dictionary* 2408 (1981). It is clear, therefore, that in this industry a sewing machine is a device similar to a "tool, die, [or] mold * * * used in the production of the imported merchandise." *Id.* at 14.

I

The issue of law controlling this later-filed action at bar and the competing arguments thereon are the same. While the decision in *Texas Apparel* is apparently one of first impression, it is persuasive, and *stare decisis* counsels adherence to it. Thus, this court concludes that the defendant is entitled to judgment on the issue herein. That is, Customs acted within its lawful authority in collecting duties based on the $89,497.42 worth of tools, dies and spare parts, as to which there is no dispute,[3] as well as based on the value of the equipment and machinery.

II

As indicated, sewing machines, including their repair parts and the cost of repairs, were held to be "assists" in *Texas Apparel*. In this action, plaintiff's motion for summary judgment contains an

[1] Slip Op. 88–148, at 8.
[2] *Id.* at 10.
[3] *Compare, e.g.*, complaint para. 16 *with id.*, paras. 6–9. *See also* plaintiff's Exhibit 1 (glove die used in presses for cutting material).

extensive list of equipment and machinery, which is categorized as knitting machines, sewing machines, presses (without dies or drills), knives and cutters, other machines, and major machine components, which together are valued at the above-mentioned sum of $421,207.81.

Both plaintiff's motion and defendant's cross-motion were submitted prior to the decision in *Texas Apparel* in the expectation that this action could be resolved by summary judgment. While such resolution was feasible in that action, and is, in essence, possible here, the opinion in *Texas Apparel* points out that

> Customs' interpretation clearly distinguishes between machinery which works directly on the merchandise or contributes directly to its manufacture, e.g., sewing machines, drill presses and ovens, and machinery which although used by the industry is not used directly in the production of the merchandise itself, e.g., air-conditioners and emergency generators.[4]

In other words, while the statutory requirement of "use in connection with the production or the sale for export to the United States of the merchandise" is broad enough to encompass equipment and machinery of the kind listed herein, some of the pieces listed may, nevertheless, not be assists, as now defined. For example, Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment notes (at page 11, n. 16):

> It appears from Schedule A * * * that there were two drill presses used to make shop tools * * *.
>
> If these articles were, in fact, only utilized to make other tools, and were not *themselves* used in the production of the imported merchandise, the Government may concede (after the proof of use is presented, and after consultation with our client) that these two machine tools may not be considered assists for purposes of section 1401a(h)(1)(A)(ii). [emphasis in original]

Simply stated, were the plaintiff entitled to summary judgment on the law, no issue of fact would require resolution. Since this is not the case, and since the interpretation of that law now raises certain issues of fact herein, the court, after due deliberation, concludes that it is in the interest of a just, speedy and inexpensive resolution of this matter to direct the parties to confer to determine if they are able to resolve themselves those issues in the light of *Texas Apparel* and before any further, formal proceedings.

The parties are to report the results of their consultation(s) to the court within 45 days hereof.

So ORDERED.

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[4] Slip Op. 88-148, at 11. *Cf. id.* at 13.

(Slip Op. 88-155)

AMERICAN BRASS, ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT, WIELAND-WERKE AG, ET AL., DEFENDANT-INTERVENORS

Court No. 87-04-00589

Before DICARLO, *Judge.*

After balancing the interests of each of the parties, the Court grants plaintiffs' application for access, under protective order, to computer tapes containing confidential information already disclosed to plaintiffs as part of the record.

[Plaintiffs' motion for access to computer tapes granted under protective order.]

(Decided November 8, 1988)

Collier, Shannon, Rill & Scott (*Jeffrey Beckington* and *Nicholas Giordano*) for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*M. Martha Ries*) for defendant.

Arnold & Porter (*Grant Finlayson* and *Michael Shor*) for defendant-intervenors.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Domestic producers of brass strip and sheet and unions representing workers in the brass industry (plaintiffs) challenge the denial of access to computer tapes used in reaching a final affirmative determination of sales at less than fair value of brass sheet and strip from West Germany. *Final Determination of Sales at Less Than Fair Value*: *Brass Sheet and Strip from the Federal Republic of Germany*, 52 Fed. Reg. 822 (Jan. 9, 1987), *amended*, 52 Fed. Reg. 35,750 (Sept. 23, 1987). The International Trade Administration of the United States Department of Commerce (Commerce) had already provided plaintiffs a certified copy of the administrative record, including microfilm and printouts of data supplied by the West German respondents (Wieland), but refused access to the computer tapes.

The Court grants plaintiffs' request for access under a protective order to ensure the confidentiality of business proprietary information contained on the computer tapes.

DISCUSSION

Plaintiffs argue the tapes are part of the record and should be provided because Commerce obtained the tapes during its investigation and based its determination on information in them.

Commerce and Wieland argue against granting access to the computer tapes because (1) plaintiffs already have a complete copy of the record, (2) releasing the tapes would risk unauthorized disclosure of proprietary information, (3) plaintiffs do not need the tapes to present their arguments, and (4) producing the tapes would impair Commerce's ability to obtain tapes in the future.

Congress defined the administrative record as consisting of:

> (i) *a copy of all information* presented to or obtained by * * * [Commerce] * * * during the course of the administrative proceeding * * * [and]
>
> (ii) a copy of the determination, all transcripts or records of conferences or hearings * * *.

19 U.S.C. § 1516a(b)(2)(A) (1982) (emphasis added).

As they contain information obtained in the investigation, the tapes are part of the administrative record. *See Daewoo Elecs. Co.* v. *United States*, 10 CIT 754, 650 F. Supp. 1003 (1986). Nevertheless, Commerce need only provide a *copy* of the record. Neither the statute nor legislative history specify the form that copy must take. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 28, *reprinted in* 1979 U.S. Code Cong. & Admin. News 381, 414. *See also* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1332, 102 Stat. 1107, 1207–09 (1988).

Plaintiffs are not deprived of any of information in the record. Commerce provided a copy of all information obtained in the investigation, even if not in a form plaintiffs wish.

Plaintiffs argue nonetheless that the printout information is too complicated and voluminous to be usable for their appeal. Although Commerce provided plaintiffs with a copy of the record as defined by 19 U.S.C. § 1516(b)(2)(A) (1982), Commerce does not have unfettered discretion to provide a copy of the record in a form unusable to the other party. As this court has noted, "[d]ata released in an unusable form are * * * the equivalent of no data at all." *Timken Co.* v. *United States*, 11 CIT ——, 659 F. Supp. 239, 240 n.3 (1987).

Plaintiffs cannot, however, claim an absolute right of access to the tapes because the data on them include business proprietary information such as customer names, financial data, and details of sales transactions in the United States and Europe. The court has broad discretion under 19 U.S.C. § 1516a(b)(2)(B) (1982) to "disclose [confidential] material under such terms and conditions as it may order." *See A. Hirsh, Inc.* v. *United States*, 11 CIT ——, 657 F. Supp. 1297, 1300 (1987). If the copy of the administrative record is in a form unusable to the petitioner, the Court may direct Commerce to provide a different form subject to protective order notwithstanding its confidential content.

In exercising its discretion to disclose confidential information the Court must balance the competing interests of the parties. The stated rule is that:

> Actions to compel disclosure of business proprietary information under protective order are evaluated in this Court *de novo* on the administrative record to determine whether the need of the party requesting access to the information outweighs the need of the party submitting the information for continued confidential treatment.

D & L Supply Co. v. *United States,* 12 CIT——, 693 F. Supp. 1179, 1181 (1988); 19 U.S.C. § 1677f(c)(2) and 28 U.S.C. § 2640(a)(4) (1982); S. Rep. No. 249, 96th Cong., 1st Sess. 100, *reprinted in* 1979 U.S. Code Cong. & Admin. News 486; *See also Timken,* 11 CIT at ——, 659 F. Supp. at 240. Each case must be considered in light of its own particular facts and circumstances. *American Spring Wire Corp.* v. *United States,* 5 CIT 256, 257, 566 F. Supp. 1538, 1540 (1983).

In balancing the interests of the parties, the Court will consider:

> (1) the needs of the litigants for data used by the government in order to adequately respond to [Commerce's] finding, (2) the needs of the government in obtaining confidential information from businesses in future proceedings, and (3) the needs of the [disclosing parties] to protect from disclosure information which, in the hands of a competitor, might injure their respective positions in the industry.

Roquette Freres v. *United States,* 4 CIT 239, 240–41, 554 F. Supp. 1246, 1248 (1982).

The Parties' Interests

1. *American Brass.*

The printouts of the Wieland data are several thousand pages. All parties concede that for plaintiffs to convert this quantity of printout to computer readable form would be prohibitively time consuming and costly. The parties disagree, however, on whether the plaintiffs require the data they seek in electronic form. Commerce and Wieland argue that for the purposes plaintiffs claim they need the tapes, the information is either readily accessible from the printout or not on the tapes.

Plaintiffs assert the tapes are necessary for full participation in their own and in Wieland's appeal of Commerce's determination. Plaintiffs claim they require the tapes to identify factual errors and to ascertain whether Commerce's methodology used to calculate adjustments in the dumping margin on Wieland's products is substantially supported on the record. Specifically, plaintiffs wish to review the accuracy of Commerce's adjustment calculations on quantity discounts, product comparisons, warehousing expenses, differences in merchandise, currency conversion, and deletion of certain sales. Plaintiffs claim a proper and full analysis will involve complex calculations that would be prohibitively costly and time consuming to do solely from the thousands of pages of printout. Plaintiffs claim an independent examination of Commerce's methodology is in keeping with the increasing accountability to which Commerce has come to be subjected. Commerce argues that this inquiry is improper, because it is for Commerce alone to choose which methodology to employ.

The Court applies a deferential standard of review to Commerce's choice of methodology. *See Mitsubishi Elec. Corp.* v. *United States,* 12 CIT ——, Slip Op. 88–152, at 51 (Oct. 31, 1988); *Silver Reed Am.,*

Inc. v. *United States*, 12 CIT——, 679 F. Supp. 12 (1988). Nevertheless, the Court is not, at this point, reviewing the merits of the methodology chosen. At this stage, plaintiffs may challenge Commerce choice of methodology. If plaintiffs' reexamination of Commerce's adjustment calculations will assist a reviewing court in determining the reasonableness of Commerce's methodology, reexamination of the calculations is permissible.

2. *Wieland*

Wieland asserts that its need to maintain the confidentiality of its data outweighs any need of the plaintiffs for access to the computer tapes. Wieland claims release of the tapes poses unreasonable risk because of the ease with which electronically stored information may be inadvertently or surreptitiously transferred and manipulated with the attendant possibility of revealing to competitor's client names, marketing strategies and other confidential information to competitors. Should its competitors gain this information, Wieland would suffer irreparable commercial harm.

Congress has directed that the "confidential or privileged status accorded to any documents, comments, or information shall be preserved * * *" in antidumping and countervailing duty actions. 19 U.S.C. § 1516a(b)(2)(B) (1982). Even an inadvertent disclosure of confidential information can be highly damaging to a business. *Chevron U.S.A., Inc.* v. *United States*, 11 CIT ——, Slip Op. 87–13 at 6 (Feb. 6, 1987). A higher risk of unauthorized disclosure of confidential information on computer tape as opposed to printouts warrants a heightened level of protection for computer tapes. *See Yale Materials Handling Corp.* v. *United States,* 11 CIT ——, 674 F. Supp. 865, 867 (1987). Nevertheless, "where complex match models are involved, computer tapes may be essential for effective advocacy." *Timken Co.* v. *United States*, 11 CIT ——, 659 F. Supp. 239, 242 (1987).

Several factors in this case indicate that a protective order would adequately achieve a necessary level of protection. First, all of the confidential information is already in the hands of the plaintiffs in printout form under a separate protective order. Although this disclosure may have occurred without Wieland's consent, that is an issue between Wieland and Commerce which initially supplied plaintiffs the information. Second, there is only a mere possibility but no apparent likelihood of disclosure. *See Yale Materials Handling Corp.*, 11 CIT at ——, 674 F. Supp. at 868. Third, the tapes would not be in the hands of the plaintiffs but rather in the sole custody of plaintiffs' outside counsel. *See D & L Supply Co.*, 12 CIT at ——, 693 F. Supp. at 1182. Processing would be done in-house at the computer facility on the business premises of plaintiffs' counsel. Plaintiffs' counsel have used their computer facility in other cases with Commerce's inspection and approval. There is no indication that the tapes would not be adequately protected in this facility. Fourth,

plaintiffs' counsel are officers of the Court subject to disbarment and other sanctions should they disclose any judicially protected information. 19 C.F.R. § 355.20(e) (1988). With all of these factors, risk of disclosure would be slight despite the more sensitive nature of the computer tapes and lack of an absolute guarantee of protection from a judicial order. *See U.S. Steel Corp.* v. *United States*, 2 Fed. Cir. (T) 46, 50, 730 F.2d 1465, 1468 (1984).

Finally, contrary to Wieland's assertions, third parties such as computer programmers are not *per se* excluded from access to confidential information on computer tape. While it may be unusual to allow access to confidential information to persons other than counsel, as long as a protective order can fashion adequate sanctions to deter disclosure by any third parties who may come into contact with the tapes it is sufficient protection. *Cf. Yale Materials Handling Corp.*, 11 CIT at ——, 674 F. Supp. at 867 (sanctions in a protective order as to outside computer companies did not contain the required degree of deterrence). While the fact that third parties may be required to assist processing of the tapes may be a factor in the decision whether to release confidential information, it will not, in and of itself, preclude access. To conclude otherwise would effectively make computer tapes unavailable in any case where counsel find it necessary to seek the assistance of computer programmers.

3. *Commerce*

Commerce asserts that release of the tapes would impair its ability to procure computer tapes in future investigations. Other West German respondents have already voiced concern about protection of confidential data requested by Commerce in anti-dumping investigations. *Memorandum of Defendant-Intervenors*, Appendix at ¶12.

The importance of avoiding such a chilling effect in future Commerce investigations has weighed heavily in prior confidential disclosure cases. *See, e.g., A. Hirsh, Inc.* v. *United States*, 11 CIT ——, 657 F. Supp. 1297, 1302 (1987); *Jernberg Forgings Co.* v. *United States*, 8 CIT 275, 276, 598 F. Supp. 390, 392 (1984); *Roquette Freres Corp.* v. *United States*, 4 CIT 239, 241, 554 F. Supp. 1246, 1248 (1982); *Nakijima All Co.* v. *United States*, 2 CIT 170, 174 (1981). Nevertheless, the fact that Commerce has already released unredacted confidential information of Wieland to the plaintiffs substantially weakens its position in this instance. Whether inadvertently or not, plaintiffs already have all the data from the tapes on printout form which includes the names of Wieland's U.S. customers. Commerce may not now claim that release on computer tape of the very unexpurgated information it has already given plaintiffs will harm its ability to procure confidential information in the future.

CONCLUSION

After considering the arguments presented in the briefs and at oral argument, the Court finds that the plaintiffs' request provides

adequate reasons for access to the computer tapes. The Court is satisfied that the printout of the data is unusable by the plaintiffs due to its size and complexity. The Court also agrees that the tapes are necessary for the plaintiffs to mount a meaningful appeal and to participate fully in the appeals of Commerce's final determination.

Upon balancing the competing interests of the parties, the Court also finds that the plaintiffs' need for the tapes outweighs Wieland's concerns of confidentiality and Commerce's interests. Accordingly, the Court directs the parties jointly to fashion a protective order within 20 days allowing plaintiffs access to the tapes. Plaintiffs' counsel are to be supplied a copy of the tapes compatible with the computer system at their in-house computer facility. This copy will contain the same information on the printout and microfilm originally supplied under protective order. Wieland may select any third party who may be necessary to assist copying or processing of the tapes so that Wieland, as the party at risk, will bear the responsibility for any disclosures. *See Timken Co.* v. *United States*, 11 CIT ——, 659 F. Supp. 239, 243 (1987).

Plaintiffs have agreed to pay the reasonable costs of copying the tapes.

(Slip Op. 88–156)

NEGEV PHOSPHATES, LTD., PLAINTIFF *v.* U.S. DEPARTMENT OF COMMERCE AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND FMC CORP. AND MONSANTO CO., DEFENDANT-INTERVENORS

Court No. 87–09–00974

Before DECARLO, *Judge.*

In an antidumping investigation of less than fair value sales of industrial phosphoric acid from Israel, the International Trade Administration's denial of a circumstance of sale adjustment for Exchange Rate Risk Insurance Scheme payments is supported by substantial evidence on the record as a whole and is according to law. In the material injury determination for the antidumping and countervailing duty investigations, the United States International Trade Commission's findings on volume of imports, its refusal to cumulate prices, and acceptance of testimony on lost sales and underselling are supported by substantial evidence and are according to law. The antidumping and countervailing duty orders are affirmed in full.

[Judgment for defendants; action dismissed.]

(Decided November 8, 1988)

Kaplan, Russin & Vecchi (*Dennis James, Jr.* and *Kathleen F. Patterson*) for plaintiff.

John R. Bolton, Assistant Attorney General, *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Platte B. Moring, III*) for defendants, with *Polina K. Smith* for the United States Department of Commerce, and *Lyn M. Schlitt*, General Counsel, *James A. Toupin*, Assistant Gen-

eral Counsel, and *Mitchell Dale* for the United States International Trade Commission.

Gibson, Dunn & Crutcher (*Joseph H. Price* and *Josiah O. Hatch, III*) for defendant-intervenors.

DICARLO, *Judge:* Negev Phosphates, Ltd. (Negev) of Israel moves pursuant to Rule 56.1 of the Rules of this Court for judgment on the record and asks the Court to vacate an antidumping order and a countervailing duty order on industrial phosphoric acid from Israel. 52 Fed. Reg. 31,057 (Aug. 19, 1987).

The Court has jurisdiction under 28 U.S.C. § 1581(c) (1982). The Court finds both the final affirmative dumping determination of the International Trade Administration of the United States Department of Commerce (Commerce), *Final Determination of Sales at Less Than Fair Value; Industrial Phosphoric Acid From Israel*, 52 Fed. Reg. 25,440 (July 7, 1987), and the affirmative material injury determination of the United States International Trade Commission (Commission), *Industrial Phosphoric Acid From Belgium and Israel*, Invs. No. 701–TA–286 (Final) and 731–TA–365 and 366 (Final), USITC Pub. 2000 (Aug. 1987), to be supported by substantial evidence on the administrative record as a whole and according to law. The imposition of the antidumping and countervailing duty orders is affirmed and this action is dismissed.

BACKGROUND

A. *The Merchandise*

Industrial phosphoric acid (H_3PO_4) is a relatively pure form of phosphoric acid produced in four acid grades: technical, food, ACS-semi, and polyphosphoric. Each grade has distinct uses. Technical grade acid is used in cleaners, cement processing, leather tanning, fire brick manufacturing, varnishes, rubber, and in downstream production of soaps, detergents, and water treatment. Food grade phosphoric acid is used in cola beverages, sugar refining, jam and jelly flavorings, yeast nutrients, and cottage cheese production. ACS-semi grade acid is used as a reagent in analytical chemistry, semi-conductor manufacture, and processing applications requiring high purity and low residue levels. Polyphosphoric grade acid is used as a catalytic agent, a surfactant in oil drilling, and in manufacturing dyes and herbicides.

The imported industrial phosphoric acid is classifiable under item 416.30 of the Tariff Schedules of the United States. USITC Pub. 2000, at 1. Since January 1, 1987, the most-favored-nation column 1 duty rate has been "free." Imports of industrial phosphoric acid were previously eligible for duty-free entry under the Generalized System of Preferences (GSP) from January 1, 1976 to December 31, 1986. Israeli products received the GSP treatment prior to the granting of duty-free entry under the United States-Israel Free Trade Implementation Act of 1985. USITC Pub. 2000, at A–11.

B. *The Petitions for Relief*

FMC Corporation and Monsanto Company (the "domestic industry") filed petitions with Commerce and the Commission alleging that imports of industrial phosphoric acid from Israel and Belgium were being sold in the United States at less than fair value and were also subsidized by the governments of Israel and Belgium and that these imports were causing material injury to a Untied States industry.

C. *Commerce's Findings*

After full investigations, Commerce found that industrial phosphoric acid imported from Israel and Belgium was being sold in the United States at less than fair value. *Final Determination of Sales at Less Value; Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,440 (July 7, 1987); *Final Determination of Sales at Less Than Fair Value; Industrial Phosphoric Acid From Belgium,* 52 Fed. Reg. 25,436 (July 7, 1987). In the countervailing duty investigation, Commerce found that the Government of Israel was providing countervailable benefits to Israeli manufacturers, producers, or exporters of industrial phosphoric acid, *Final Affirmative Countervailing Duty Determination; Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 25,447 (July 7, 1987); but that the Kingdom of Belgium was not providing countervailable benefits to the Belgian industry, *Final Negative Countervailing Duty Determination; Industrial Phosphoric Acid From Belgium,* 52 Fed. Reg. 25,443 (July 7, 1987).

D. *The Commission's Findings*

The Commission majority determined that imports of industrial phosphoric acid from Israel found to be subsidized and sold in the United States at less than fair value, cumulated with the volume of industrial phosphoric acid from Belgium sold in the United States at less than fair value, are causing material injury to a domestic industry. *Industrial Phosphoric Acid from Belgium and Israel,* USITC Pub. 2000 (Aug. 1987). Negev petitioned the Commission to reconsider its determination because the domestic industry announced price decreases shortly after the Commission issued its final affirmative injury determination. The Commission denied Negev's petition for reconsideration.

Standard of Review

The Court is directed to hold unlawful final affirmative determinations of Commerce or the Commission if either determination is not supported by substantial evidence on the record as a whole or is otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1982); *Washington Red Raspberry Comm'n* v. *United States,* Nos. 88–1076, 1107 (Fed. Cir. Oct. 13, 1988) (Commerce); *Atlantic Sugar, Ltd.* v. *United States,* 2 Fed. Cir. (T) 130, 132, 744 F.2d 1556, 1559 (1984) (Commission). Substantial evidence on the record as a whole

does not mean a large or considerable amount of evidence but rather "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2550 (1988). Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 602, 620 (1966); *ICC Indus.* v. *United States*, 812 F.2d 694, 699 (Fed. Cir. 1987). However, the traditional deference courts pay to an agency's interpretation of a statute is not to be applied to alter the clearly expressed intent of Congress, *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986); nor is the Court to defer to decisions which are based on inadequate analysis or reasoning, *USX Corp.* v. *United States*, 11 CIT ——, 655 F. Supp. 487, 492 (1987). It is not the court's function, however, to decide that it would have made another decision on the basis of the evidence. *Matsushita Elec. Indus. Co.* v. *United States*, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). Rather, the court will sustain the determination if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence. *Universal Camera Corp.* v. *National Labor Relations Bd.*, 340 U.S. 474, 488 (1950); *American Lamb Co.* v. *United States*, 4 Fed. Cir. (T) 47, 54, 785 F.2d 994 (Fed. Cir. 1986); *Atlantic Sugar, Ltd.* v. *United States*, 2 Fed. Cir. (T) 130, 136, 744 F.2d 1556, 1563 (1984).

Discussion

Negev challenges (I) Commerce's refusal to make a circumstance of sale adjustment in its final determination of sales at less than fair value and (II) the Commission's (A) findings on volume of imports, (B) refusal to cumulate prices, and (C) acceptance of testimony on lost sales and underselling.

I. *Commerce's Denial of a Circumstance of Sale Adjustment*

Commerce denied Negev's claim for a circumstance of sale adjustment for payments made under an Exchange Rate Risk Insurance Scheme (EIS).

During the investigation, Commerce asked Negev to "explain the type of adjustment claimed for EIS rebates." R. 488 (supplemental questionnaire). Negev responded that:

> On the U.S. sales reported, [Negev] received insurance rebates to account for *differences in exchange rates vis a vis inflation.* Sales to the local market are not included in the exchange rate insurance. Take out: Local sales which instead would have been exported would have received according to the actual results [confidential] positive payment. We do not want to show the [confidential] figure.

R. 520; Conf. R. 377 (emphasis added). Commerce also asked Negev:

> How is the EIS rebate amount determined? Are any premiums paid by [Negev] accounted for? Will the EIS payment for the second necessarily be the same as the first on a per M/T [metric ton] basis? Explain fully.

R. 488. To these questions Negev responded:

> The EIS rebate is determined by the *difference between the movement of the exchange rate of a basket of currencies and local inflation.*
>
> Our calculations include are after deducting the premium paid.
>
> On a per ton basis, the receipt would be the same for each sale to the U.S. during a time period when the results of the EIS are the same, and the price received is the same, the EIS received would be the same per ton.

R. 520 (emphasis added).

Commerce denied Negev's claimed adjustment for EIS receipts. Commerce's preliminary determination stated that "[p]articipation in the EIS is an overall management technique to safeguard against currency fluctuations. As such, indemnity payments resulting from the program do not qualify as directly-related expenses under [19 C.F.R. § 353.15]." *Preliminary Determination of Sales at Less Than Fair Value; Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 12,952, 12,952–53 (Apr. 20, 1987). In its final dumping determination, Commerce described EIS payments as representing "compensation for foreign exchange losses" which Negev incurred between the date of each United States sale and the date of payment. 52 Fed. Reg. at 25,441. Because Commerce determines the United States price

> as of the date of sale and, thus, before it becomes affected by such losses resulting from the devaluation of the local currency relative to the currency of the outstanding foreign receivables, no adjustment for EIS receipts is appropriate. Similarly, the absence of EIS receipts for the sales in the home market does not represent a circumstance of sale expense because sales in the home market are made in local currency and are not subject to foreign currency fluctuations.

52 Fed. Reg. at 25,441. Commerce thus determined that the EIS payments did not qualify as "directly related" expenses under 19 C.F.R. § 353.15 and consequently denied the circumstance of sale adjustment. *Id.* While Commerce denied a circumstance of sale adjustment, Commerce did reduce Negev's antidumping duty deposit rate from 6.62 percent to 1.77 percent to represent the countervailable benefit of the EIS payments to Negev. Commerce reasoned that because "antidumping duties cannot be assessed on the portion of the margin attributable to export subsidies, there was no reason to require a cash deposit for that amount." *Antidumping Duty Order; Industrial Phosphoric Acid From Israel,* 52 Fed. Reg. 31,057, 31,057 (Aug. 19, 1987).

At oral argument Commerce conceded that its description in the antidumping duty investigation mischaracterized the EIS program because the record shows that Negev did not actually incur any foreign exchange rate losses on either of the two verified sales made during the period of investigation. Commerce qualified its concession, however, by stating that foreign exchange losses might apply in other circumstances, and that its determination is thus still legally valid. Commerce agrees with Negev that the EIS program is correctly described in the companion countervailing duty determination:

> The [EIS] program, operated by the Israel Foreign Trade Risk Insurance Corp. Ltd. (IFTRIC), is aimed at insuring exporters against losses which result when the rate of inflation exceeds the rate of devaluation and the [New Israeli Shekel] value of an exporter's foreign currency receivable does not rise enough to cover increases in local costs.
>
> The EIS scheme is optional and open to any exporter willing to pay a premium to IFTRIC. Compensation is based on a comparison of the change in the rate of devaluation of the [New Israeli Shekel] against a basket of foreign currencies with the change in the consumer price index. If the rate of inflation is greater than the rate of devaluation, the exporter is compensated by an amount equal to the difference between these two rates multiplied by the value-added of the exports. If the rate of devaluation is higher than the change in the domestic price index, however, the exporter must compensate IFTRIC.

52 Fed. Reg. at 25,449–50.

Commerce also conceded at oral argument that (1) Negev received EIS payments, (2) that the payments were on two sales made to the United States, (3) that the payments were tied to the two sales, (4) that Negev recorded the EIS payments as revenue, and (5) that Negev received no comparable payments for its home-market sales in Israel. Even with these concessions, Commerce states that it correctly determined that the EIS payments do not qualify for a circumstance of sale adjustment because they are not the type of expense or credit for which Commerce allows adjustments, nor do the EIS payments satisfy the requirements of 19 C.F.R. § 353.15.

The antidumping law provides in part that:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> *　*　*　*　*　*　*
>
> (B) other differences in circumstances of sale; * * * then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1982). In order to facilitate adjustments for differences in the circumstances of sale, Commerce promulgated 19

C.F.R. § 353.15, which sets out specific classes of adjustments and provides criteria for determining the amount of allowances under 19 U.S.C. § 1677b(a)(4)(B) (1982). *Smith-Corona Group, Consumer Prods. Div., SCM Corp.* v. *United States,* 1 Fed. Cir. (T) 130, 135, 713 F.2d 1568, 1574 (1983), *cert. denied,* 465 U.S. 1022 (1984). Commerce set forth the general rule for circumstance of sale adjustments in 19 C.F.R. § 353.15(a):

> In comparing the United States price with the sales, or other criteria applicable, on which a determination of foreign market value is to be based, reasonable allowances will be made for bona fide differences in the circumstances of the sales compared to the extent that it is established to the satisfaction of the Secretary [of Commerce or his designee] that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.

19 C.F.R. § 353.15(a) (1988). Commerce's regulations also provide examples of adjustments that will be allowed, generally involving the seller's providing a service in one market that either is not provided in the other market or is provided on different terms:

> Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in commissions. Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise by a purchaser.

19 C.F.R. § 353.15(b) (1988).

Commerce found that the payments Negev received from the Israeli government on certain export sales as compensation for the effects of inflation and exchange rate fluctuations is not within the realm of service items covered by the regulation on circumstance of sale adjustments. The EIS program is not a credit, warranty, or guarantee extended to a purchaser; it is not technical assistance given to a buyer; nor is it the assumption by the seller of the purchaser's advertising or selling costs. Commerce found the EIS program to be strictly a benefit conferred upon the seller, which Commerce determined to be a countervailable subsidy in the companion investigation. 52 Fed. Reg. at 25,449–50.

Further, the EIS receipts do not account for any difference in the prices of the sales that Commerce compared. The price that Negev charged its United States and home market purchasers for its product was not affected by the EIS payments. Negev simply received a

rebate payment of purchase price from its government after the date of payment of the purchase price by the United States purchaser. The EIS payments are based upon a comparison of the change in the rate of devaluation of the New Israeli Shekel against a basket of foreign currencies with the change in the consumer price index. The method of calculating the EIS payment is not related to the price of the product that Negev established at the time of sale. Far from being assured of a payment under the EIS program, Negev might actually have had to pay money to IFTRIC if the rate of devaluation was higher than the change in the domestic price index. 52 Fed. Reg. at 25,449–50. *Cf. Certain Welded Carbon Steel Standard Pipe and Tube from India; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 9089 (Mar. 17, 1986), and *Sawhill Tubular Div., Cyclops Corp.* v. *United States,* 11 CIT ——, 666 F. Supp. 1550 (1987) (circumstance of sale adjustment allowed and affirmed for government payments made under an international price reimbursement scheme to exporters who faced no possibility that they themselves might have to pay money).

Congress has given Commerce broad discretion to determine whether a factor or condition of sales warrants an adjustment in foreign market value for circumstances of sale. *Carlisle Tire & Rubber Co.* v. *United States,* 9 CIT 520, 528–29, 622 F. Supp. 1071, 1078 (1985); *Brother Indus.* v. *United States,* 3 CIT 125, 540 F. Supp. 1341 (1982). At best, Negev offers a different methodology with which to analyze EIS payments. The Court, however, may not substitute its judgment for that of Commerce when there is a choice between two fairly conflicting views, even though the Court might have made a different choice had the matter been before it *de novo. Mitsubishi Elec. Corp.* v. *United States,* 12 CIT ——, Slip Op. 88–152, at 51 (Oct. 31, 1988); *Hercules Inc.* v. *United States,* 11 CIT ——, 673 F. Supp. 454, 469 (1987).

The Court finds that Commerce reasonably exercised its discretion under 19 U.S.C. § 1677b(a)(4)(B) (1982) and 19 C.F.R. § 353.15 in determining that the EIS payments did not qualify for a circumstance of sale adjustment. The Court also finds that Commerce did account for the EIS payments by reducing Negev's antidumping duty deposit rate from 6.62 percent to 1.77 percent to represent the countervailable benefit of the EIS payments to Negev. This reduction conforms to Article VI(4) of the GATT, which prohibits products from being "subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." General Agreement on Tariffs and Trade, art. VI, ¶4, *opened for signature* Oct. 30, 1947, 61 Stat. A11, A24, T.I.A.S. No. 1700. The Court finds that Commerce's determination is according to law and based on substantial evidence in the record as a whole.

II. *The Commission's Affirmative Injury Determination*

Pursuant to 19 U.S.C. § 1671d(b), the Commission determined that a United States industry is materially injured by reason of imports from Israel of industrial phosphoric acid that Commerce found to be subsidized by the government of Israel. USITC Pub. 2000 at 1. The Commission also determined, pursuant to 19 U.S.C. § 1673d(b), that a United States industry is materially injured by reason of imports from Belgium and Israel of industrial phosphoric acid that Commerce found to be sold in the United States at less than fair value. USITC Pub. 2000 at 1.

The Commission majority based its affirmative material injury determination primarily on the overall decline in the domestic industry's performance, increased volume and market share of cumulated imports from Israel and Belgium, and evidence of underselling of the domestic product by the imports causing price suppression and price depression. *Id.* at 3. The Commission's Chairman and Vice-Chairman dissented. *id.* at 23, 39.

Negev does not challenge the Commission's determination that the domestic industry producing industrial phosphoric acid is suffering material injury. Nor does Negev contend that the data obtained in the investigation was immaterial or improperly derived. Rather Negev claims that evidence on the record as a whole shows that (a) the volume of imports was insignificant; (b) there was no significant price undercutting, price depression, or price suppression; and (c) the Commission majority should not have relied on allegations of lost sales and revenues as proof of the impact of imports on the domestic industry's profitability.

A. *Volume*

Negev challenges the Commission's discussion of the volume of imports on two grounds. First, Negev claims that the Commission "avoided" making a finding as to whether the volume of imports is significant. Second, Negev claims that, by "fail[ing] to keep in perspective the very small quantities of imports involved," the Commission ignored evidence of record indicating that the volume of imports could not be a significant factor contributing to the harm suffered by the domestic industry. Negev notes the value and volume of import penetration at its peak, and cites the dissenting views of the Chairman and Vice-Chairman that the volume of imports was not significant. Negev provides no other support for its contention that import penetration levels or trends are insignificant.

In its determination, the Commission majority noted Negev's contention that the volume of imports was too low to constitute a cause of material injury to the domestic industry. The majority cited legislative history to the Trade Agreements Act of 1979 that a given level of imports may or may not be significant, depending on other factors. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 88 (1979). The Commission stated that

> a certain volume of imports in a market dominated by a relatively healthy domestic industry may be incapable of causing material injury. However, in a market where both consumption and the performance of the domestic industry are in decline, and where there is severe price competition, that same volume of imports, even if it should lead to a relatively small number of lost sales, may cause substantial price suppression or depression, thereby reducing profitability throughout the domestic industry. Thus, whether a significant cause of material injury depends upon the conditions of trade in the industry, the nature of the industry itself, and the economic conditions of the industry at the time of the imports become a factor in the market.

USITC Pub. 2000, at 18. *Accord USX Corp.* v. *United States*, 11 CIT ——, 655 F. Supp. 487, 490 (1987) (citing H.R. Rep. 317, 96th Cong., 1st Sess. 46 (1979)). Having noted that even small volumes of imports—should they suppress or depress domestic prices—may be a cause of material injury, the Commission then stated that it was "particularly significant that the sharpest increase in the absolute and in the relative volume of imports, as well as in the ratio of the value of imports to the value of total and open market domestic consumption, occurred in 1984–1985, when the performance of the domestic industry suffered a very marked decline." USITC Pub. 2000 at 19.

The record evidence on which the Commission relied for its conclusion shows that the volume and market share of the imports grew steadily during the period of investigation. *Id.* at 18–19, A94–95; Conf. R. Doc. 24 at 57–61. The cumulative volume of imports from Belgium and Israel increased from 21.7 million pounds in 1984 to 47.6 million pounds in 1985, and increased again to 53.6 million pounds in 1986. USITC Pub. 2000 at 18. As a percentage of total apparent domestic consumption, imports from Belgium and Israel increased from 0.9 percent in 1984, to 2.2 percent in 1985, to 2.5 percent in 1986. USITC Pub. 2000 at 18–19. As a share of total consumption in the open market, where importers compete for sales with domestic producers, the level of imports increased in volume from 2.7 percent in 1984, to 5.9 percent in 1985, to 7.0 percent in 1986. *Id.* at 19, A94.

The Commission majority determined that the decline in domestic prices, in conjunction with import penetration trends and pricing practices, established a casual link between the imports and the material injury of the domestic industry. The Commission majority found it "particularly significant that the sharpest increase in the absolute and in the relative volume of the imports, as well as in the ratio of the value of imports to the value of total and open market domestic consumption, occurred in 1984–1985, when the performance of the domestic industry suffered a very marked decline." *Id.* at 19.

The fact that the Commission did not explicitly declare that the volume of imports was significant is not fatal, for the Court may uphold a decision of less than ideal clarity if the agency's path may

reasonably be discerned. *Ceramica Regiomontana* v. *United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987); *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984), *aff'd sub nom. Armco, Inc.* v. *United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). The Commission is required to determine whether the domestic industry is materially injured by reason of the imports under investigation, *see* 19 U.S.C. § 16773d(b)(1), and to provide a rationale for its determination. *Bowman Transp. Inc.* v. *Arkansas Best Freight Sys.*, 419 U.S. 281, 285–86 (1974). The Commission, however, is not required to make explicit findings with respect to all the factors that it considers. *Gifford-Hill Cement Co.*, 9 CIT at 369–70, 615 F. Supp. at 587.

Within the constraints of maintaining the confidentiality of business proprietary information, the Commission considered and addressed in the majority's findings the steady growth in the absolute and relative volume of imports, and the significance of these trends having coincided with a decline in the condition of the domestic industry as domestic prices fell. The Commission majority recognized that "import volume alone cannot be used to gauge accurately the effect of imports," *USX Corp.*, 11 CIT at ——, 655 F. Supp. at 490, in an industry manufacturing a product that is price sensitive and fungible, because even small volumes of imports may, by virtue of underselling, cause price suppression and depression. The Commission majority found that although industrial phosphoric acid may be produced in varying assays or concentrations, it is essentially a fungible product. USITC Pub. 2000 at 14, and determined that there has been significant underselling by the imports. In reaching its determination that the cumulated imports had an adverse impact on domestic prices, the Commission considered evidence of lost sales, underselling, and domestic producers' reductions in price in order to meet competition from imports. *Id.* Having thus articulated a rational connection between the underlying facts found and its ultimate determination, the Court finds that the Commission, in accordance with 19 U.S.C § 1677(7)(C)(i), did consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant," and that the majority's determination is supported by substantial evidence on the record as a whole.

B. *Price Levels*

The Commission majority found that over the period of investigation, the prices of imports from Belgium and Israel have generally been below those of the domestic industry:

> The Commission gathered quarterly price data for the sale of industrial phosphoric acid from the first quarter of 1984 through the first quarter of 1987. Domestic prices were generally stable during 1984 and 1985, yet they declined sharply over the period from the first quarter of 1986 through the first quar-

> ter of 1987. U.S. producer's technical grade prices were approximately four to nine percent lower in January–March 1987 than they were in 1984.

USITC Pub. 2000 at 20. The Commission found that with respect to the price trends for imports, to a certain extent, the data were mixed:

> In some quarters, imported acid from Belgium or from Israel was sold to end users or to distributors at prices higher than the prices charged by the domestic industry. Yet in the market for 75-percent assay technical grade acid, wherein the bulk of sales of both imported acid and domestic acid occurred, the data show a significant degree of underselling by importers; and in the market for 80-percent assay technical grade acid, there is even a greater degree of underselling. Further, to the extent there is evidence of overselling of the imported product, both the volumes of imported acid sold at such higher prices, and the number of transactions involved, were relatively small.

USITC Pub. 2000 at 21. The Commission majority thus concluded that the "presence of the lower priced [less than fair value] and subsidized imports in the market has had a suppressive and depressive effect on prices." USITC Pub. 2000 at 22.

Negev contends that it is not true that prices of imports from Belgium and Israel have "generally" been lower than those of the domestic industry, nor is there a "significant degree of underselling by importers" in the 75-percent and 80-percent assay technical grade acid markets, the Commission majority did not discuss the evidence of pricing reported by the purchasers, the Commission should have examined the range of import and domestic prices as it has in other investigations, and having cumulated the volume of imports from Belgium and Israel, the Commission was also required under the cumulation statute to cumulate the prices of those imports.

1. *Evidence in Support of the Commission's Findings*

In assessing the price effects of imports under investigation, the Commission must consider whether—

> (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii) (1982). "[A]ny time the Commission relies on underselling to support its determination, it must support its finding of underselling with evidence in the record." *Alberta Pork Producers' Mktg. B.* v. *United States,* 11 CIT ——, 669 F. Supp. 445, 465 (1987), *aff'd following remand,* 12 CIT ——, 683 F. Supp. 1398 (1988).

The Commission majority acknowledged that the price trends for imports, in terms of their relation to domestic prices, were "mixed." USITC Pub. 2000 at 21. While the Commission did not cite the specific incidents of underselling, the Commission found "a significant degree of underselling by importers" in the 75-percent assay technical grade segment of the market, where the bulk of import sales occurred, as well as in the 80-percent assay technical grade market. The Commission had sent questionnaires to the major importers and domestic producers of industrial phosphoric acid requesting data as to the prices they charged to both distributors and end users. Price questionnaires with usable data were received from five domestic producers, accounting for 100 percent of domestic shipments in 1986, and four importers of phosphoric acid, accounting for almost all imports from Belgium and Israel. *Id.* at 20 n.83.

Questionnaire respondents provided, for each calendar quarter over the period of investigation (January 1984 to March 1987), the net f.o.b. price charged for the single largest shipment to their "three best customers" on sales of 75-percent and 80-percent assay technical grade acid to both distributors and end users. *See, e.g.,* Conf. R. Doc. 25.28, at 15. In the questionnaires, "best customers" were defined as those customers who purchase large quantities of industrial phosphoric acid on a regular basis. The pricing data obtained related to sales involving substantial volumes of imports and, by reflecting large shipments to "best customers," were intended to avoid analysis of incidental spot sales. To ascertain whether the decline in domestic prices may have been caused by the incidence of import underselling, the Commission staff calculated and compared the "weighted-average" or "unit" prices charged by United States producers and by importers of Belgian and Israeli acid in the four primary market segments where the domestic industry and importers compete for sales. *See* Conf. R. Doc. 24 at 78–82.

The Court has examined the confidential business proprietary information on the prices of 75-percent assay technical grade and 80-percent technical grade sold to distributors and end users, as well as 75 percent assay food grade and agricultural grade industrial phosphoric acid. *See, e.g.,* Conf. R. Doc. 24, at 78–82. The record supports the Commission's comparison of United States versus Belgian and Israeli prices in the distributor and end user markets for technical grade acid as showing that the Israeli or Belgian product did undercut United States producers' prices in most of the comparisons. USITC Pub. 2000 at 21; Conf. R. Doc. 24 at 78–82. The Commission also noted that most of the cases where overselling was found involved end users, who may have less leverage in negotiating a lower purchase price where the volume of acid being purchased was small. *Id.* at n.91. These statements indicate that the Commission did consider evidence of overselling, and the Commission's majority opinion does acknowledge that the data as to overselling and underselling are "mixed." *Id.* at 21.

The Court finds that the Commission did consider evidence of overselling, and that the Commission's conclusions on underselling are supported by substantial evidence on the record as a whole.

2. *Price Cumulation*

Negev argues that because the Commission cumulated the volume of Israeli imports with the Belgian imports, the cumulation statute further required the Commission to cumulate the prices of the Israeli and Belgian imports. Although the Commission's power to cumulate import statistics is now well-established, *see Fundicao Tupy S.A.* v. *United States,* 12 CIT ——, 678 F. Supp. 898, *aff'd,* No. 88–1233 (Fed. Cir. Oct. 19, 1988); Mock, *Cumulation of Import Statistics in Injury Investigations before the International Trade Commission,* Nw. J. Int'l L. & Bus. 433 (1986), the question of whether "price" comprises one of those import statistics which the Commission must cumulate is a question of first impression in this Court.

The Trade and Tariff Act of 1984 established a statutory standard for the Commission to cumulate import statistics in an investigation:

> For purposes of clauses (i) and (ii), the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

19 U.S.C. § 1677(7)(C)(iv) (Supp. IV 1986). Clauses (i) and (ii) provide:

> (i) **Volume**
>
> In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to the production or consumption in the United States, is significant.
>
> (ii) **Price**
>
> In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—
>
> (I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and
>
> (II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(i) and (ii) (1982).

Negev argues that Congress intended for the Commission to cumulate the prices of imports as well as volume.

The Commission states that it was its practice prior to Congress' enactment of the cumulation provision in the 1984 Act, and it has since been the Commission's consistent practice, *not* to undertake a

unitary import price analysis. *See, e.g., Color Picture Tubes From Canada, Japan, The Republic of Korea, and Singapore,* Inv. Nos. 731–TA–367 through 370 (Final), USITC Pub. 2046 (Dec. 1987); *Certain Forged Steel Crankshafts From the Federal Republic of Germany and the United Kingdom,* Inv. Nos. 731–TA–351 and 353 (Final), USITC Pub. 2014 (Sept. 1987); *Certain Malleable Cast-Iron Pipe Fittings From Thailand,* Inv. No. 731–TA–348 (Final), USITC Pub. 2004 (Aug. 1987); *Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers From Italy and Yugoslavia,* Inv. Nos. 731–TA–342 and 346 (Final), USITC Pub. 1987 (June 1987); *Certain Fresh Cut Flowers From Canada, Chile, Columbia, Costa Rica, Ecuador, Israel, and the Netherlands,* Inv. Nos. 731–TA–327 through 331 (Final), USITC Pub. 1956 (Mar. 1987); *Top-Of-The-Stove Stainless Steel Cooking Ware From Korea and Taiwan,* Inv. Nos. 701–TA–267 and 268, 731–TA–304 and 305 (Final), USITC Pub. 1936 (Jan. 1987); *Certain Brass Sheet and Strip From Brazil, Canada, and the Republic of Korea,* Inv. Nos. 731–TA–311, 312, and 315 (Final), USITC Pub. 1930 (Dec. 1986); *Butt-Weld Pipe Fittings From Brazil and Taiwan,* Inv. Nos. 731–TA–308 and 310 (Final), USITC Pub. 1918 (Dec. 1986); *Oil Country Tubular Goods from Canada and Taiwan,* Inv. Nos. 701–TA–255, 731–TA–276 and 277 (Final), USITC Pub. 1865 (June 1986); *Iron Construction Castings from Canada,* Inv. No. 731–TA–263 (Final), USITC Pub. 1811 (Feb. 1986); *Low Fuming Brazing Copper Wire and Rod from New Zealand,* Inv. No. 731–TA–246 (Final), USITC Pub. 1779 (Nov. 1985).

While Negev recognizes the Commission's substantial record of consistent refusal to cumulate prices, Negev argues "that does not mean that Congress did not intend for it to do so." *Plaintiff's Reply Brief* at 63. Negev claims that "Congress *obviously* meant for cumulated imports to be considered as a unit for purposes of volume *and* price analysis." *Id.* (emphasis added).

The Commission denies that Congress intended the Commission to analyze the price effects of imports through the unitary weighted average import price analysis which Negev proposes.

In enacting the Trade Agreements Act of 1979, Congress required the Commission to consider various factors bearing on the question of whether material injury to the domestic industry is "by reason of" the imports under investigation. Congress did not direct the Commission to analyze in any particular manner the volume of imports, their price effects, and their impact on the domestic industry. *See* S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979). In enacting the Trade and Tariff Act of 1984, however, Congress directed the Commission, in considering the volume and effect of imports under investigation, to "cumulatively assess the volume and effects of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market." 19 U.S.C. § 1677(7)(C)(iv) (Supp. IV 1986). *See also* Omnibus Trade and

Competitiveness Act of 1988, § 1330, Pub. L. No. 100–418, 102 Stat. 1107, 1206–07 (1988) (Commission may treat as negligible and having no discernable adverse impact on the domestic industry imports from any country that is a party to a free trade agreement with the United States which entered into force and effect before January 1, 1987, *i.e.*, Israel, if the Commission determines that the domestic industry is not being injured by reason of those imports).

The Commission's interpretation of the 1984 cumulation statute is that it "does not mandate a 'unitary' import price analysis; it plainly states that the Commission shall cumulatively assess the 'effects,' including the price effects, of imports, and does not provide that the Commission cumulatively assess import prices." *United States International Trade Commission's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record* at 40.

In the absence of a statutory requirement or prohibition, the Commission has discretion in its choice of reasonable analytical methodologies. *See Mitsubishi Elec. Corp.* v. *United States,* 12 CIT ——, Slip Op. 88–152, at 51 (Oct. 31, 1988); *Kenda Rubber Indus. Co.* v. *United States,* 10 CIT 120, 126–27, 630 F. Supp. 354, 359 (1986); *American Spring Wire Corp.* v. *United States,* 8 CIT 20, 23, 590 F. Supp. 1273, 1277 (1984), *aff'd sub nom. Armco, Inc.* v. *United States,* 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985). The Commission argues that Negev's interpretation of the cumulation statute as requiring a unitary pricing analysis contravenes Congress' intent. The Commission points to legislative history of the cumulation statute:

> The purpose of mandating cumulation under appropriate circumstances is to eliminate inconsistencies in Commission practice and to ensure that the injury test adequately addresses simultaneous unfair imports from different countries * * *. The Committee believes that the practice of cumulation is based on the sound principle of preventing material injury which comes about by virtue of several simultaneous unfair acts or practices.

H.R. Rep. No. 725, 98th Cong., 2d Sess. 37, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5127. The Commission thus considers the cumulation requirement to ensure that all adverse price effects resulting from unfairly traded imports from different countries that occur over the period of investigation are considered by the Commission in its causation analysis. *See also* Bello & Holmer, *The Trade and Tariff Act of 1984: Principal Antidumping and Countervailing Duty Provisions,* 19 Int'l L. 639, 660 (1983).

Negev argues that the effect of the statutorily prescribed cumulation is to eliminate country differentials and to proceed with an analysis using one set of unitary numbers representing all imports under investigation. *Plaintiff's Reply Brief* at 61.

The Commission states that Negev's proposed analysis would aggregate import prices in a manner that masks underselling in a price sensitive market and contravene the requirement that the Commission fairly consider the adverse price effects of all imports under investigation:

> Under plaintiff's unitary import price analysis, where imports from one country undercut the prices charged by U.S. producers, the extent of that underselling is masked by a higher "combined import price" caused by another country's overselling during the same time period. Since plaintiff has not shown that the effects of underselling of imports from Belgium in one series of transactions are somehow nullified by simultaneous overselling of imports from Israel in another series of transactions, a unitary price analysis in this case is contrary to the express purpose of cumulation.

United States International Trade Commission's Memorandum in Opposition to Plaintiff's Motion for Judgment on the Agency Record at 43. By masking the incidence of price undercutting by importers, the Commission finds Negev's unitary combined import price analysis is misleading for analysis of the Belgian and Israeli imports.

While Negev offers another interpretation of the cumulation statute, this does not render the Commission's interpretation of the statute unlawful or make the determination contrary to law. *Matsushita Elec. Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984). A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by an agency charged with administering the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984). The Court holds that the Commission is not required under the cumulation statute to cumulate the prices of imports. This holding should not be read to prohibit the Commission from undertaking such an analysis in a future investigation if it is warranted under the record before the Commission and if the Commission finds it to be a helpful analytical tool in making its material injury and threat of material injury determinations.

3. *Price Range Analysis*

Negev also argues that the Commission should have examined the relative pricing of imports by comparing the range of import prices to the range of domestic prices, i.e., comparing the importers' lowest and highest prices on transactions against the domestic producers' lowest and highest prices. Negev claims that a price range analysis is necessary because the low and high domestic prices differ widely, and is proper because the Commission has used this methodology in other investigations. *See, e.g., Certain Steel Valves and Certain Parts Thereof from Japan,* Inv. No. 731–TA–145 (Final), USITC Pub. 1556 (July 1984); *Portland Hydraulic Cement from Australia and Japan,* Invs. Nos. 731–TA–108 and 109 (Final), USITC Pub. 1440 (Oct. 1983).

Although Negev claims a price range analysis is necessary, there is no statutory requirement to do so and the Commission has elected to not undertake a price range analysis in other investigations involving price undercutting by fungible imports. *See, e.g., Certain*

Acetylsalicylic Acid (Aspirin) from Turkey, Inv. Nos. 701-TA-283 and 731-TA-364 (Final) USITC Pub. 2001 (Aug. 1987); *Urea from the German Democratic Republic, Romania, and the Union of Soviet Socialist Republics,* Inv. Nos. 731-TA-338-340 (Final), USITC Pub. 1992 (July 1987); *In Shell Pistachio Nuts from Iran,* Inv. No. 731-TA-287 (Final), USITC Pub. 1875 (July 1986); *Nitrocellulose from France,* Inv. No. 731-TA-96 (Final), USITC Pub. 1409 (July 1983); *Sodium Nitrate from Chile,* Inv. No. 831-TA-91 (Final), USITC Pub. 1357 (Mar. 1983).

In the absence of a statutory requirement, the Commission's discretionary election not to conduct such an analysis does not render its determination contrary to law. Nonetheless, the Court has examined the confidential record and finds that Negev's price range analysis, which in several instances compares individual sale prices for small quantities of imports, does not substantially detract from the evidence upon which the Commission relied to find significant price undercutting. *See Certain Steel Valves and Certain Parts Thereof from Japan,* Inv. No. 731-TA-145 (Final), USITC Pub. 1556, at 13-14 (July 1984) ("considerable overlap between prices * * * is typical of competitive markets").

The Court finds that Negev's alternative methodology does not refute the substantial evidence supporting the Commission majority's determination, and that the Commission's determination not to use this analysis in this investigation is neither arbitrary nor capricious. Negev offers "another rational characterization of the evidence," *Gifford-Hill Cement Co.,* 9 CIT 357, 372, 615 F. Supp. 577, 589 (1985), but this does not warrant reversal or remand of the determination under the substantial evidence standard of review. *See Matsushita Elec. Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984).

C. *Lost Sales and Underselling*

The Commission majority stated that in considering the impact of the cumulated imports on prices, it considered

> the volumes of the imported acid sold at specified average prices, the testimony of witnesses and other record evidence as to lost sales due to underselling by respondents, and the domestic industry's price reductions to meet the competition from the subject imports.

USITC Pub. 2000 at 22.

a. *Testimony*

Negev challenges the Commission's consideration of "testimony of witnesses and other record evidence as to lost sales and underselling by respondents and the domestic industries price reductions to meet the competition from subject imports." *Plaintiff's Brief* at 54-55.

The Commission states that the hearing testimony supported the domestic industry's claims that: 1) the domestic industry is in vigor-

ous price competition with imports and has had to reduce prices to keep from losing more market share, 2) that notwithstanding reductions in unit costs of production, the domestic industry's profit margins have eroded due to "pricing problems," and 3) that price is a principal reason why some domestic buyers purchase Belgian or Israeli imports.

While Negev dismisses the testimony as "self serving statements by witnesses for FMC and Monsanto," *Plaintiff's Brief* at 57, assessments of the credibility of witnesses are within the province of the trier of fact. *See Anderson* v. *City of Bessemer,* 470 U.S. 564, 575 (1985); *Matsushita Elec. Indus. Co.* v. *United States,* 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 935 (Fed. Cir. 1984). This Court lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation. *Copperweld Corp.* v. *United States,* 12 CIT ——, 682 F. Supp. 552 (1988). *See also,* DeGrandis, *Proving Causation in Antidumping Cases,* 20 Int'l L. 563, 579–80 (1986) (judicial review of the Commission's causation findings).

b. *Lost Sales Data*

The confidential version of the staff report identifies the number of companies with which the Commission's staff communicated regarding lost sales and revenues. Conf. R. Doc. 24 at 87–91. Negev argues the Commission's determination is flawed because of the Commission's reliance on this data.

While the Commission may find anecdotal evidence to be a helpful analytical tool in some cases, it is not an absolute requirement. Where fungible goods are concerned, volume may be the best indicator of lost sales, rather than the anecdotal evidence obtained in the typical lost sales study. *USX Corp.* v. *United States,* 11 CIT ——, 655 F. Supp. 487, 491 (1987). Negev offers an alternative interpretation of the evidence, but is has failed to show that the Commission's determination does not rest upon such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Matsushita,* 3 Fed. Cir. (T) at 51, 750 F.2d at 933.

The Court finds the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law. *See City Lumber Co.* v. *United States,* 59 CCPA 89, 92, 457, F.2d 991, 994 (1972).

Conclusion

The Court finds both Commerce's final determination of sales at less than fair value and the Commission's material injury determination by reason of dumped and subsidized imports to be supported by substantial evidence on the administrative record as a whole and according to law. The action is dismissed.

(Slip Op. 88-157)

THE COMPETITIVE EDGE, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-07-00981

Before DICARLO, *Judge.*

Athletic shoes with PVC suede sponge uppers are not classifiable under item 700.56 of the Tariff Schedules of the United States (TSUS) because the exterior surface area of the uppers is not over 90 percent plastic. Classification of the athletic shoes under item 700.61, TSUS, is affirmed.

[Judgment for defendant; action dismissed.]

(Decided November 9, 1988)

Grunfeld, Desiderio, Lebowitz & Silverman (*Steven P. Florsheim*) for plaintiff.

John R. Bolton, Assistant Attorney General, *Joseph I. Liebman*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael T. Ambrosino*) for defendant.

DICARLO, *Judge:* This action concerns the proper tariff classification of athletic shoes from Taiwan invoiced as "Men's PVC Suede Sponge Leather Sport Shoes." The United States Customs Service (Customs) classified the shoes under item 700.61 of the Tariff Schedules of the United States (TSUS), as "[o]ther: [f]ootwear having soles * * * of rubber or plasics * * * affixed to the upper exclusively with an adhesive * * * [v]alued not over $6.50 per pair."

The Competitive Edge (importer) contends the shoes are properly classifiable under item 700.56, TSUS, as "[o]ther footwear * * * [h]aving uppers of which over 90 percent of the exterior surface area is rubber or plastics * * *."

The Court has jurisdiction under 28 U.S.C. § 1581(a) (1982). The Court holds that the footwear is not properly classifiable under item 700.56, TSUS, and affirms Custom's classification of the footwear under item 700.61, TSUS.

BACKGROUND

Marketed under the brand name "Jox," the imported athletic shoes come in two color combinations of grey with maroon trim and navy with white trim. The uppers of the shoes contain no rubber but consist of two types of materials. The first material is the plastic trim which comprises less than ten percent of the exterior surface area of the upper.

The second material of the upper is blue or grey depending upon the color combination of the shoe. This material comprises the remainder of the shoe upper and has four layers. The bottom layer is a woven fabric. The next layer is a hardened plastic foam. The third layer consists of a blown-on nylon flocking which has a velvet-like texture and appearance. The fourth and last substance is a plastic applied to the nylon flocking. After bonding of these layers, the upper surface is lightly buffed.

This upper surface area is the focus of this controversy. Application of the top plastic layer and buffing removes some of the plastic on the surface of the material. These processes alter the material's surface appearance and texture from velvet-like to suede-like. Under a microscope, some of the nylon flocking fibers are visible above the surface of the shoe. Some of the visible fibers are coated with the plastic and some are not.

The following are the relevant sections of TSUS:

Schedule 7, Part 1, Subpart A, Headnotes:

> 3. For the purposes of items 700.51 through 700.56, the rubber or plastics forming the exterior surface area specified, if supported by fabric or other material, must coat or fill the supporting material with a quantity of rubber or plastics sufficient to visibly and significantly affect the surface otherwise than by change in color, whether or not the color has been changed thereby.
>
> * * * * * * *
>
> Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:
>
> * * * * * * *
>
> Other footwear * * *:
>
> having uppers of which over 90 percent of the exterior surface area is rubber or plastics * * *

Item 700.56 Other ....6% *ad val.*

> * * * * * * *
>
> Footwear (whether or not described elsewhere in this subpart) which is over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics:
>
> Other:
>
> Footwear having soles * * * of rubber or plastics which are affixed to the upper exclusively with an adhesive * * *:

Item 700.61 Valued not over $6.50 per pair .....37.5 *ad val.*

Issues

1. Whether the outer platic layer on the uppers of the shoes forms the exterior surface area of the suede-like material.

2. Whether the shoes have uppers of which over 90 percent of the exterior surface area is plastic.

DISCUSSION

A classification by Customs of imported merchandise is presumed to be correct and the importer has the burden of proving that Customs' classification is incorrect. 28 U.S.C. § 2639(a)(1) (1982). The importer need not establish that its proposed classification is correct. *Jarvis Clark Co.* v. *United States,* 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). Rather, it is the court's duty to ascertain the correct classification, both independently and in comparison with the importer's alternative. *Id.*

In order to be classifiable under item 700.56, TSUS, as the importer contends, imported footwear must satisfy two requirements. First, the shoe must meet the general requirement of Schedule 7, Part 1, Subpart A, Headnote 3, TSUS (Headnote 3). Headnote 3 provides that if the "plastics forming the exterior surface area" of the shoe upper is supported by fabric or other material, the plastic must also "coat or fill the supporting material with a quantity of * * * plastics sufficient to visibly and significantly affect the surface otherwise than by a change in color * * *." The second requirement is that the exterior surface area of the shoe upper be more than 90 percent plastic. Item 700.56, TSUS.

As to the requirement in Headnote 3, neither party asserts that the outermost plastic layer on the shoe uppers does or does not fill the supporting flocking. Moreover, the parties agree that the plastic visibly affects the surface area by changing the texture and appearance of the material from velvet-like to suede-like. Nevertheless, Customs does not agree that the plastic forms the exterior surface nor that the exterior surface is over 90 percent plastic. Customs argues that the application, bonding, and buffing of the plastic settles it toward the bottom of the flocking fiber so that most of the fiber strands are not encapsulated by the plastic but rather stand free and uncovered at the surface above the layer of plastic.

Both parties conducted independent laboratory analyses of the material on the uppers of the shoes to determine the extent to which the exterior surface area of the material is plastic. Both tests involved cutting small swatches of the material and dyeing it with an identification stain so to distinguish the nylon flocking from the plastic on the surface. Both tests then subjected the material to microscopic examination at varying magnifications. The Court admitted into evidence photographs and heard testimony of expert witnesses on the respective observations and conclusions from the two tests.

Both parties concluded that at the upper-most portions of the material, a substantial number of nylon strands protruded above the plastic layer. The parties disagreed to what extent these freestanding fibers were coated with plastic. The importer's expert witness, a chemist and chemical engineer, testified that all fibers below 50–60 percent of the height of the nylon flock are completely covered in plastic. R. 34. Only 20 percent of all the flocking fibers he observed

protrude above the surface, R. 60, and of those that do protrude, over 90 percent are coated with plastic. R. 48. The importer's witness concluded, therefore, that the suede-like material is almost entirely plastic. Accordingly, the importer argues that the shoe uppers are over 90 percent plastic.

Customs offered testimony from the Chief of the Fibers Branch of the Customs Laboratory in New York. The witness testified that Customs' laboratory analysis on ¼ to ⅓ of the shoe revealed that the flocking on the exterior surface of the shoe is fibrous and remains uncoated and unencapsulated with plastic. According to the witness' observations, application of the plastic and the buffing process on the flocking leave 95 percent of the fibers freestanding above the surface and uncoated by plastic. R. 141. Only five percent or less of the freestanding fibers were covered with plastic. R. 108. In addition, the small percentage of plastic encapsulated fibers are unchanged in that they do not bond together or form into clusters. Customs asserts, therefore, that the vast majority of the flocking fibers are not plastic coated and that the exterior surface of the upper cannot be more than 90% plastic.

The focus of the requirements in Headnote 3 and item 700.56, TSUS, is the composition of the exterior surface area of the material on the upper. Based upon the testimony of the expert witnesses and an examination of the evidence, the Court finds that the plastic layer does not form the exterior surface of the material on the upper. Read *in pari materia* with item 700.56, TSUS, where the surface is coated or filled with plastics per Headnote 3, the plastics must form the exterior surface. *See Inter-Pacific Corp.* v. *United States,* 8 CIT 132, 139 n.3, 594 F. Supp. 743–44 n.3 (1984). *Webster's Third New International Dictionary* (1986) defines the term "exterior" as "situated at and forming the outer surface or limit." *Funk and Wagnalls New Standard Dictionary of the English Language* (1942) defines "exterior" as "[f]orming the outer side (of) constituting or connected with the external part"; "[i]mmediately and outwardly manifest; noted by the senses; visible." Using these definitions, the court in *Inter-Pacific Corp.* held that the common meaning of the term "exterior surface area" is "a sensory perception manifest as being the *outermost covering* of a particular object without regard to the functionality of the coverage." 8 CIT at 139 (emphasis added). By this definition, the evidence shows that the plastic lies at a lower level than the outermost portion of the material defined by the protruding fibers. Thus, the protruding fibers rather than the plastic form the exterior surface of the material.

The Court also holds that the nylon flocking forming the exterior surface area of the material is not itself plastic within the meaning of Headnote 3 or item 700.56, TSUS. While in a broad sense the nylon flocking is made of plastics, the nylon strands of the flocking are more specifically described in TSUS as man-made fibers. "Articles of plastic are not always, and perhaps not usually, in the form

of * * * fabrics. Schedule 7 itself makes separate provision in a number of instances for articles of man-made fibers or textile materials and the same articles of plastics." *F.B. Vandegrift & Co.* v. *United States,* 63 Cust. Ct. 12, 17, C.D. 3866, *aff'd,* 56 CCPA 105, C.A.D. 962, 410 F.2d 1259 (1969). *See also R.H. Macy & Co.* v. United States, 62 Cust. Ct. 219, C.D. 3733, 297 F. Supp. 171 (1969), *aff'd,* 57 CCPA 115, C.A.D. 988, 428 F.2d 856 (1970) (as employed in Schedule 7, Part 12, TSUS, the term plastic does not cover plastic materials converted into textile materials). As the flocking is composed of nylon strands, a synthetic, man-made filament, *see Webster's Third New International Dictionary* 1553, 2321 (1981) (defining "nylon" and "synthetic"), it will be considered fiber and not plastic for the purposes of tariff classification under Schedule 7, Part 1, TSUS.

As the protruding nylon fibers comprise the exterior surface area of the material and are not themselves plastic, it is necessary to calculate the amount of plastic on the individual nylon strands in order to determine whether the material meets the requirements of item 700.56, TSUS. Based on the evidence presented, the Court concludes that the uppers of the shoes are less than 90 percent plastic. Although the importer asserted that over 90 percent of all the fibers counted were coated with plastic, there was little indication from the evidence that a majority of the fibers are plastic covered. Nothing in the photographs of the material indicates that those fibers that do have plastic on them have any more than a few clumps on the strand and few fibers in the photographs have a plastic meniscus or web at their base which would indicate a plastic covering. Moreover, most of the strands that the importer claims to be covered by a thin film of plastic remain dyed the same color as uncoated strands. The only evidence that there may have been plastic on many of these strands is a certain rougher appearance than would be expected with smooth strands of nylon filament. The Court is unconvinced that this roughness is not attributable to other factors such as abrasions from the buffing, melts from heat or friction, or contaminants unconnected to the manufacturing process.

Although estimations are concededly imprecise, the Court is satisfied that Customs' calculations of the amount of plastic on the nylon strands were more thorough. Unlike the importer's analysis, Customs considered the varying lengths of the individual fibers and calculated the proportion of plastic to nylon by viewing the surface area of the strands as three dimensional rather than by merely counting the exposed fibers. Customs also considered that uncoated fibers might be longer than coated fibers because buffing would take more plastic off the longer fiber strands.

Customs' witness estimated that at best the upper surface was 75 percent plastic and his lowest estimate was 45 percent. R. 98, 100. Even assuming the more generous figure is correct, when one includes the 10 percent coverage of the plastic trim, the exterior surface area of the shoe uppers is still less than 90 percent plastic.

While some of the fibers that stand free may have some quantity of plastic on them, the Court finds that the shoes have an insufficient amount of plastic on the uppers to be considered over 90 percent plastic. Accordingly, the Court holds that the footwear is not classifiable under item 700.56, TSUS.

Conclusion

Based upon the evidence presented, the Court finds the imported athletic shoes are not classifiable under item 700.56, TSUS, because the exterior surface area of the upper is not over 90 percent plastic. The Court affirms Custom's classification of the shoes under item 700.61, TSUS.

(Slip Op. 88-158)

Companhia Siderurgica Paulista, S.A., et al., plaintiffs v. United States, defendant

Court No. 87-02-00159

[ITA's determination as to rates applicable to COSIPA and CSN sustained.]

(Dated November 9, 1988)

Willkie Farr & Gallagher, (*William H. Barringer, Arthur J. Lafave, III, Robert A. Peterson*), for plaintiffs.

John R. Bolton, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch (*Platte B. Moring, III*), Civil Division, United States Department of Justice for defendant.

Opinion and Order

Restani, *Judge:* Plaintiffs, two Brazilian steel companies, Companhia Siderurgica Paulista S.A. (COSIPA) and Companhia Siderurgica Nacional S.A. (CSN), bring this action under section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a, contesting the final results of an administrative review of a countervailing duty order by the United States Department of Commerce, International Trade Administration (ITA) in *Carbon Steel Products from Brazil,* 52 Fed. Reg. 829 (Jan. 9, 1987). Pursuant to Rule 56.1 of the Rules of this Court, plaintiffs move for judgment upon the agency record.

Background

On November 10, 1983, the United States Steel Corporation (now known as the USX Corporation) filed a countervailing duty petition with ITA and the International Trade Commission (ITC), alleging that certain carbon steel products from Brazil, including hot-rolled and cold-rolled carbon steel sheet, were receiving subsidies within

the meaning of § 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671 (1982), and that an industry in the United States was materially injured, or threatened with material injury, by reason of such imports.

As a result, ITA initiated a subsidy investigation and on April 26, 1984 issued its final determination that certain benefits constituting subsidies within the meaning of the countervailing duty law were being provided to Brazilian manufacturers, producers or exporters of certain carbon steel products. In that determination, net subsidies of 36.48 percent and 62.18 percent were calculated for COSIPA and CSN, respectively.[1] Following ITC's finding that the subject products were materially injuring a United States industry, ITA published its countervailing duty order on June 22, 1984, directing customs to collect cash deposits of estimated countervailing duties. *Carbon Steel Products from Brazil,* 49 Fed. Reg. 25,655.

On September 6, 1985, ITA revoked the countervailing duty order with retroactive effect to October 1, 1984. *Carbon Steel Products from Brazil,* (Final Results of Changed Circumstances Administrative Review and Revocation of Countervailing Duty Order), 50 Fed. Reg. 36,460. The revocation resulted in part from the entry into force of a Voluntary Restraint Agreement between the United States and Brazil which imposed quotas on exports of certain Brazilian steel products including the subject merchandise.

With respect to merchandise subject to the countervailing duty order that entered the United States on or after February 10, 1984, the date of ITA's preliminary affirmative determination, and before October 1, 1984, the effective date of the revocation of the countervailing duty order, ITA announced its intention to conduct an administrative review, if requested to do so. *Id.* at 36,461.

On September 30, 1985, the Government of Brazil and three importers requested such an administrative review. The administrative review was initiated on November 27, 1985 with plaintiffs, COSIPA and CSN participating as respondents. 50 Fed. Reg. 48,825. ITA published the preliminary determination in the administrative review on October 31, 1986. *Carbon Steel Products from Brazil,* 51 Fed. Reg. 39,774. In the preliminary determination, ITA found that equity investments in COSIPA and CSN made by the Brazilian government between 1977 and 1984 were "on terms inconsistent with commercial considerations" and therefore countervailable subsidies. *Id.* at 39,776.

ITA issued its final determination in the administrative review on January 9, 1987, reaffirming its preliminary findings on all issues, including the alleged equity subsidies provided to COSIPA and CSN. The value of the overall net subsidies was determined to be

[1] A net subsidy rate of 17.49 percent was calculated for a third Brazilian company, Usinas Siderurgicas de Minas Gerais, S.A. (USIMINAS). 49 Fed. Reg. at 17,988.

9.14 percent *ad valorem* for COSIPA and 39.98 percent *ad valorem* for CSN.[2] *Carbon Steel Products from Brazil,* 52 Fed. Reg. 829.

The equity infusions at issue in this case were intended to finance the third stage (Stage III) of a three-stage expansion program which each of the plaintiff companies was carrying out simultaneously. Plans to expand Brazil's steel industry were initially formulated in the late 1960's after a study commissioned by the Brazilian government concluded that the comparative advantage Brazil had in producing steel (namely, its abundant resources of high grade iron ore and relatively inexpensive labor force), coupled with the prospective growth of domestic demand, justified a substantial expansion of the country's steel-making capacity. The study further concluded that the best strategy to bring about such an expansion was to expand the country's large integrated mills rather than establish a new integrated plant.

In accordance with these suggestions, and in cooperation with the World Bank, COSIPA and CSN (as well as USIMINAS) began to expand capacity in the late 1960's. By the late 1970's, Stages I and II of the coordinated expansion program were completed, substantially increasing the raw steel production capacity of both firms. The third stage of the expansion program was approved in 1975 by the World Bank and other sources of non-Brazilian financing and as originally intended to be completed by 1979.

Arguments

Plaintiffs make three basic arguments: (1) that ITA's determinations that COSIPA and CSN were not equityworthy between 1977 and 1984 and that the Government of Brazil did not expect a reasonable rate of return on its investment in those companies during this period were not supported by substantial evidence in the record; (2) that the benchmark rate of return used to measure any equity subsidy found, should be the average rate of return for the steel industry, not a national average rate of return; (3) that ITA erroneously calculated the benefit to certain trading companies which were also covered by the review.

Discussion

I. Equityworthiness of COSIPA and CSN

Under section 701 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1671 (1982 & Supp. IV 1986) (the Act) ITA is required to determine whether foreign manufacturers or exporters are receiving subsidies from foreign governments or other foreign entities with respect to merchandise imported into the United States. If ITA's determination is affirmative and the International Trade Commission determines that imports of the subsidized merchandise are materially injuring an industry in the United States, countervailing duties

[2] Maxitrade, a trading company, was found to receive a net subsidy valued at 38.45 percent *ad valorem.*

equal to the net amount of the subsidies must be imposed upon the subsidized goods entering the United States.

Section 771(5) of the Act, as amended, defines subsidy to include "[t]he provision of capital, loans, or loan guarantees *on terms inconsistent with commercial considerations.*" 19 U.S.C § 1677(5)(B)(i) (1982) (emphasis added). Although the statute does not define the phrase "inconsistent with commercial considerations," both the legislative history of the Trade Agreements Act of 1979 and subsequent decisions of this court make clear that "an investment is to be considered consistent with commercial considerations if a reasonable investor could expect a reasonable rate of return on is investment within a reasonable period of time." *British Steel Corp.* v. *United States,* 10 CIT 224, 226, 632 F. Supp. 59, 61 (1986) (citing *British Steel Corp.* v. *United States,* 9 CIT 85, 605 F. Supp. 286, 293 (1985)).[3]

Thus, under the "commercial considerations" test, ITA attempts to analyze the investment of equity capital from the standpoint of a reasonable private investor. According to the methodology set forth in ITA's Subsidies Appendix,[4] the agency prefers to analyze the investment by reference to the market price of shares in the investigated company. "If the government buys shares directly from the company [either a new issue or corporate treasury stock], and similar shares are traded in a markets, a subsidy arise[s] if the government pays more than the prevailing market price." Subsidies Appendix, 49 Fed. Reg. at 18,020. When there is no market price for the shares (as where, for example, the government is the owner of the company) ITA determines whether the equity infusion is inconsistent with commercial considerations by "assessing the company's prospects at the time the equity infusions were made to determine whether the company is 'equityworthy', i.e. whether it is a reasonable investment from the perspective of a reasonable private investor." *Saudi Iron and Steel Co.* v. *United States,* 12 CIT ——, Slip Op. 88–131 at 6 (October 5, 1988). In making this determination, ITA considers a wide range of indicators which are set forth in the Subsidies Appendix:

> To be "equityworthy," a company must show ability to generate a reasonable rate of return within a reasonable period of time. In making our equityworthiness determinations, we assess the company's current and past financial health, as reflected in various financial indicators taken from its financial

[3]Addressing the question of when government funds are provided to a company under conditions inconsistent with commercial considerations, the Subcommittee on Trade of the House Committee on Ways and Means observed in its "Summary of Recommendations for Legislation Implementing the Multilateral Trade Negotiations," 96th Cong., 1st Sess. 4 (Comm. Print 21 (1979)):

> With regard to the provision of capital, "commercial considerations" shall mean consideration of whether at the time the capital is provided, the recipient is required, and can be expected within a reasonable period of time, to derive from its operations a reasonable rate of return on its invested capital.

[4]In 1984, ITA published the "Subsidies Appendix" in conjunction with its final affirmative countervailing duty determination in *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina,* 49 Fed. Reg. 18,006, 18,016 (April 26, 1984). ITA has characterized the Subsidies Appendix as "a detailed explanation of the current countervailing duty methodology we use to examine grants, loans, loan guarantees, and equity." Subsidies Appendix, 49 Fed. Reg. at 18,016. Its primary purpose is to "clarify issues concerning the calculation of the gross subsidy" given the lack of clear legislative guidance on this subject in the Trade Agreements Act of 1979. *Id.*

> statements, and, where appropriate, internal accounts. We give great weight to the company's recent rate of return on equity as an indication of financial health and prospects. Like our creditworthiness tests, our equityworthiness analysis also takes into account the company's prospects, as reflected in market studies, country and industry forecasts, and project and loan appraisals, when these types of analyses are available.

Subsidies Appendix, 49 Fed. Reg. at 18,020.

In making its determination that COSIPA and CSN were not equityworthy in this case, ITA found that by the time Stage III construction began in the late 1970's, "the investment climate had deteriorated, international markets for steel began to decline, and public sector investment dried up." 52 Fed. Reg. at 832. Acknowledging that Stage II may still have yielded positive financial returns despite the financial and economic conditions at the time, ITA focused its analysis on the overall operational and financial performance of the producers. The results of this analysis are set forth in the final determination:

> In the late 1970s and early 1980s, the Brazilian steel industry was characterized by Stage III construction delays, marginal or negative earnings, and a mounting economic and financial crisis. The lack of funding in the industry became critical. (The Brazilian government had a history of underfunding steel expansion projects.) By 1982, the three companies would have required 3 billion dollars in equity to correct their financial positions. Although it is now clear that the companies were severely undercapitalized, we cannot base our equityworthiness decision on what the financial standing of the companies might have been if this were not the case.
>
> The three companies had a uniform response to the conditions in the late 1970s: they contracted variable-rate debt at a time of high real interest rates, and they used increasing amounts of short-term debt. Not only were the companies undercapitalized, but they mismatched long-term assets with expensive short-term debt.
>
> During this time, an investor would have found that the steel companies were incapable of covering the additional debt expense with internally generated funds. The steel companies had a low probability of increasing earnings over the short- and medium-term from domestic sales because of the squeeze between supplier price increases and the government's policy of steel price suppression. Further, it became increasingly evident that there was a long-term decline in the world-wide demand for steel, continuing the depression of steel prices in the international market.
>
> A project such as Stage III can have future positive returns only if the company does not become insolvent. In this case, the

> continuation of Stage III severely jeoparidzed the companies' financial standing. Even if we disregard profit margins and asset turnover, we cannot disregard the adverse effects of increased financial leverage on the companie's equity standing. The additional risk in the three highly leveraged companies would have dissuaded any private investor from purchasing equity in these Brazilian steel firms during the periods we consider them not to be equityworthy.

Id. at 833.

Plaintiffs challenge ITA's findings, basing their belief that COSIPA and CSN were equityworthy and that the government of Brazil expected a reasonable rate of return on investments made in those companies on a number of factors.

Central to plaintiffs' argument is their belief that ITA's reliance on "short-term static financial ratios and overall operating performance is an insufficient measure of long run investment potential and future company performance." 52 Fed. Reg. at 832 (comment 18). Plaintiffs argue that the agency should have placed greater emphasis on certain long-range studies in the record which predicted rises in demand and shortages of supply for the international steel industry in the 1980's and 1990's.[5] The court disagrees. As ITA stated in its determination:

> In contemplating an equity purchase, an investor will evaluate past and present company performance, anticipated future economic conditions and overall investment climate. Important determinants include the financial stability of the company (e.g., asset structure, funding sources, and risk of insolvency), past earnings, and the amount of financial leverage in the company's capital structure.

Id. at 832.

While long-range market studies and predictions are important elements of investment strategy, it is not reasonable to conclude that they alone should be the determinative, or even decisive, elements of that strategy. An investment decision based only upon anticipated returns ten to twenty years down the line is highly speculative at best. ITA properly utilized a more comprehensive analysis, which focuses on a company's current health and past performance as well as independent studies and forecasts for the industry in general.[6]

[5] The court rejects defendant's counsel's argument that ITA need not consider secret reports not available to private investors. It is the reasonableness of governmental entity conduct which is at issue. In any case, ITA did not express the view that it could not consider such reports, rather it seems to have considered them and given them little weight due to changed circumstances.

[6] Plaintiffs also argue that ITA failed to recognize the importance of Brazil's position as a global least-cost steel producer to the decisions to invest in COSIPA and CSN. While the 1975 World Bank studies envisioned low-cost production facilities as central to the success of the Stage III project, by the time construction began in the late 1970's costs for both companies had increased considerably due to such factors as increasing raw material costs, construction delays, declines in productivity and higher interest rates. Confidential Document Number (CR) 1004 at 5; CR 1006 at 5. As defendant notes, "plaintiffs ignore the effects of these problems upon the low-cost assumptions made in 1975." Defendant's Brief at 46.

In any event, even if the court were to conclude that these long-range studies could justify an investment in the Brazilian steel industry, despite the adverse data relied on by ITA, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Electric Indus. Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo* v. *Federal Maritime Comm'n,* 383 U.S. 607 (1966); *Armstrong Bros. Tool Co.* v. *United States,* 626 F.2d 168, 170 n.3 (1980)). The determinative factor is whether ITA, based on all of the evidence of record, could properly come to the conclusion that the investment was not one which a reasonable investor would make.

Plaintiffs next argue that ITA's analysis is flawed because it fails to distinguish the operating performance and the financial performance of the companies thereby allowing the financial pressures exerted by the long-term expansion programs to obscure the fundamental strength of the companies. Citing the report of an independent financial consultant, plaintiffs suggest that if ITA is to rely on short-term indicators and financial ratios, it should adjust those indicators and ratios to account for assets under construction and that portion of short-term and long-term debt associated with the expansion. Plaintiffs' Brief at 59 (citing the Report of George J. Konomos dated November 11, 1986, Confidential Document Number (CR) 10 at Ex. 17).

In its final determination, ITA correctly recognized the fallacy in plaintiffs' argument when it stated that "[f]rom an investor's point of view, there is no relevant distinction between financial and operating results." 52 Fed. Reg. at 833. ITA further explained the importance of considering a company's financial performance:

> Evaluation on the basis of current operating results (profit margin and asset turnover), without considering non-operational assets and accompanying liabilities, may be an appropriate approach for analyzing profit centers within a company. An investor, however, is concerned with the company's overall performance. To do otherwise, an investor would be ignoring the effects of the Stage III expansion program on the company. Non-performing assets not only drag down overall operating performance, but the chance that they might never come on-stream creates additional uncertainty for future earnings and therefore increases the risk of the investment.

Id. at 833.

In a related argument, plaintiffs contend that the very fact that the companies were undercapitalized made government equity investment commercially reasonable. Referring to an independent financial report which indicated that the major weakness of each company was "*too little* equity in proportion to debt," plaintiffs argue that "[i]f expert financial analysis indicates that COSIPA and

CSN could have profitably absorbed very large amounts of equity, then it is contrary to law for [ITA] to determine that a series of smaller, cumulative equity infusions constitutes a subsidy." Plaintiffs' Brief at 76.

The court rejects this argument. The fact that a company is undercapitalized does not necessarily make an investment in that company commercially reasonable. The fact that a company is undercapitalized ordinarily makes that company a greater investment risk. As defendant notes, "[a]s a consequence of inadequate capitalization, a firm must increase its debt portfolio in order to finance its operations. Too little equity means that a company is highly leveraged, *i.e.*, it relies much more heavily on debt than equity to finance its operations." Defendant's Brief at 41–42. Thus, an undercapitalized company may be less attractive to the reasonable investor due to the risk of insolvency. In any case, undercapitalization is not a determinative factor by itself.

Plaintiffs finally contend that ITA's equityworthiness determination is flawed because the performance of COSIPA and CSN in the years 1981–1983 was affected by a series of events that could not reasonably have been foreseen by a prospective investor, namely: (1) "a debt crises of gargantuan proportions" (2) "the austerity program implemented by the Government in response to the debt crisis [which] led to further contraction of the Brazilian economy" and (3) "a 'maxi-devaluation' which resulted in overnight paper losses of hundreds of millions of dollars by companies carrying foreign currency debt." Plaintiffs' Brief at 66–67. Plaintiffs maintain that these events were unforeseeable, unique and unlikely of repetition and, therefore, irrelevant to the question of whether the decision to invest was commercially reasonable. Plaintiffs ask the court to remand this action to ITA with instructions to eliminate these events from its analysis. Plaintiffs' Brief at 64–68.

While plaintiffs correctly note that investors attach less significance to economic events which are truly unique and transient, this was not the case with the events referred to by plaintiffs. Instead, the economic events of the early 1980's reflected serious weaknesses in the Brazilian economy that have more than short-term effects and that seriously affected the financial health of companies operating in that economy. These events certainly would have been of concern to a reasonable investor. As defendant correctly observes, "[t]o argue, as plaintiffs do, that the worst recession since World War II, a severe government austerity program, and a continuing debt crisis had no effect upon investor expectations is equivalent to asserting that the unforeseeable and unique crash of the stock market in 1929 would not have altered United States investors' expectations

at that time." Defendant's Brief at 38. Plaintiffs' argument is without merit.[7]

II. ITA's Calculation of the Subsidy Benefit

Having determined that the Brazilian government's equity infusions were inconsistent with commercial considerations, therefore constituting a countervailable subsidy, ITA then measured the benefit of the subsidy utilizing the "rate of return shortfall method." Under ITA's rate of return shortfall methodology, which was first set forth in the Subsidies Appendix, *see supra,* note 4, the agency measures the benefit of the subsidy "by multiplying the difference between the company's rate of return on equity and the national average rate (the 'rate of return shortfall') for the review period by the total amount of equity purchases made in years in which the company was unequityworthy." Subsidies Appendix, 49 Fed. Reg. at 18,020.

In this case, ITA calculated the benefit of the subsidy by comparing the companies' rates of return with the national average rate of return on equity in Brazil for 1984, as reported in *Business Latin America* (November 6, 1985). 51 Fed. Reg. at 39,776. *See also* CR 7 at 6. It found that "the rates of return for these producers were lower than the national average rates in 1984." 51 Fed. Reg. at 39,776. This "rate of return shortfall" was then multiplied by all purchases of equity (back to 1977) that ITA found to be inconsistent with commercial considerations.

Plaintiffs argue that ITA erred when it compared the rates of return for the investigated firms with the national average rate of return, and that the agency should have instead used the average rate of return for the steel industry as the benchmark rate for comparison purposes. According to plaintiffs, during 1984 the steel industry in Brazil earned an average rate of return of 1.1% on equity, a rate which yields a lower subsidy value than the national average rate of return used by ITA. Plaintiffs' Brief at 83.[8]

Plaintiffs have failed to persuade the court that use of the industry-specific rate would yield a more accurate measurement of the subsidy conferred. Instead use of this rate would seem to lead to absurd results. As indicated, the industry-specific rate of return on equity in this case was apparently very low. It is not unreasonable to assume that the economic factors which contributed to this low rate of return were the very same factors which contributed to ITA's findings that the industry was not equityworthy. Thus, plaintiffs, in

[7] The court also finds no basis for plaintiffs' claim that in considering these events, ITA has impermissibly based its determination on hindsight. While the economic events of the 1981–83 period did affect the "results ultimately achieved in those years," they would have also affected the expectations of reasonable investors during the period. As indicated, the equity infusions and investment decisions at issue in this case were made by the Brazilian government throughout the 1977–1984 period.

[8] It should be noted that plaintiffs here do not appear to be challenging ITA's use of "rate of return shortfall methodology" generally, but only the reasonableness of the way in which it was applied in this case. *Cf. Saudi Iron and Steel Co.* v. *United States,* 12 CIT ——, 686 F. Supp. 914 (1988) (finding reliance on the Subsidies Appendix an insufficient basis for applying "rate of return shortfall methodology" in the absence of further explanation based on the facts of the case, after plaintiffs challenged use of the methodology generally.) *See also Saudi Iron and Steel Co.* v. *United States,* 12 CIT ——, Slip Op. 88-131 (October 5, 1988) (affirming remand results).

effect, ask the court to conclude that because steel was such a poor investment during the period, the rate of subsidization, and corresponding duties should be lower. Such a conclusion is not logical and is completely at odds with the purpose of the countervailing duty laws.

Furthermore, a national average rate of return which reflects varying rates of return and levels of risk across the whole economy would seem to provide a better benchmark against which to compare the rate of return and risk of a particular investment. A reasonable investor will not limit investment options to a particular industry but will consider a wide variety of investment options when deciding where to most effectively invest money. An industry-specific analysis which does not account in some manner for this variety of options does not yield a more accurate measurement of the subsidy conferred.

III. Benefits to Trading Companies

Finally, plaintiffs contend that ITA erred in its calculation of benefits conferred on certain trading companies. Plaintiffs' counsel explained at oral argument that if the court remands this action to ITA with instructions to recalculate subsidy rates, the newly calculated rates could be so close as to warrant use of a countrywide rate. *See* 19 U.S.C. § 1671e(a)(2) (Supp. IV 1986) and 19 C.F.R. § 355.33(f) (1987). As indicated, company specific rates were calculated for both COSIPA and CSN in the determination under review. It is apparently plaintiffs' belief that the rates established for the trading companies might skew the countrywide rate, which might be calculated on remand, to their detriment. Because the court affirms ITA's equityworthiness determination and its method for calculating benefits in this case, it would appear, based on statements at oral argument, that the court need not reach issues regarding the calculation of subsidy rates for the trading companies.

As all issues regarding the trading companies were not fully briefed, the court will permit the parties to address whether these issues are indeed moot for purposes of this aspect of the case or are otherwise not suitable for decision at this time. Plaintiffs shall file their statement on this point within ten days of this determination. If plaintiffs assert that the trading company issues must be addressed, defendant shall respond in ten days, plaintiffs may reply within five days.

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